EDITOR'S NOTE

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. 84-1340-CFX
atus: GRANTED

Title: Wendy Wygant, et al., Petitioners
v.
Jackson Board of Education, etc., et al.

cketed:
bruary 21, 1985

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Cade Jr.,K. Preston

Counsel for respondent: Susskind,Jerome A.

try	Date	Note	Proceedings and Orders
1	Jan 4 1985		Application for extension of time to file petition and order granting same until February 22, 1985 (O'Connor, January 7, 1985).
2	Feb 21 1985	G	Petition for writ of certiorari filed.
3	Mar 19 1985		Brief of respondents Jackson Bd. of Ed., et al. in opposition filed.
4	Mar 20 1985		DISTRIBUTED. April 12, 1985
5	Apr 15 1985		Petition GRANTED.
			**********
7	May 10 1985		Order extending time to file brief of petitioner on the merits until June 24, 1985.
8	Jun 4 1985		Record filed.
9	Jun 4 1985		Certified copy of C. A. proceedings received.
0	Jun 13 1985		Record filed.
1	Jun 19 1985		Brief amicus curiae of Pacific Legal Foundation filed.
2	Jun 24 1985		Order further extending time to file brief of petitioner on the merits until June 28, 1985.
3	Jun 22 1985		Brief amicus curiae of Michigan State Police Troopers Assn., et al. filed.
4	Jun 24 1985		Brief amicus curiae of Anti-Defamation League of B'Nai Brith filed.
5	Jun 24 1985		Brief amicus curiae of American Federation of Teachers, AFL-CIO filed.
6	Jun 24 1985		Brief amicus curiae of Local 36, International Assn. of Firefighters, et al. filed.
7	Jun 25 1985		Lodging received.
8	Jun 25 1985		Brief amicus curiae of United States filed.
9	Jun 26 1985		Lodging received. (18 copies).
0	Jun 24 1985		Brief amicus curiae of Mid-America Legal Foundation filed.
1	Jun 28 1985		Joint appendix filed.
2	Jun 28 1985		Brief of petitioners Wendy Wygant, et al. filed.
3	Jul 11 1985	D	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae, for civiced argument and for additional time for oral argument filed.
5	Jul 5 1985		Order extending time to file brief of respondent on the merits until August 23, 1985.
6	Aug 20 1985		Lodging received.
7	Aug 23 1985		Brief of respondents Jackson Bd. of Ed., et al. filed.
8	Aug 23 1985		Brief amicus curiae of Jackson Education Association filed.
9	Aug 23 1985		Brief amicus curiae of National Education Association, et al. filed.

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. 84-1340-CFX

try	Date	Note	Proceedings and Orders
0	Aug 23 1985		Brief amicus curiae of Congressional Coalition filed.
1	Aug 23 1985		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law and ACLU filed.
2	Aug 23 1985		Brief amicus curiae of Equal Employment Advisory Council filed.
3	Aug 23 1985		Brief amicus curiae of National School Boards Association filed.
4	Aug 23 1985		Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed.
5	Aug 23 1985		Brief amicus curiae of Greater Boston Civil Rights Coalition, et al. filed.
6	Aug 23 1985		Brief amicus curiae of Affirmative Action Coordinating Center, et al. filed.
7	Aug 23 1985		Brief amicus curiae of Mexican American Legal Defense Fund filed.
8	Aug 23 1985		Brief amicus curiae of NAACP filed.
9	Aug 22 1985		Brief amicus curiae of Michigan Civil Rights Commission filed.
0	Aug 21 1985		Brief amicus curiae of City of Detroit filed.
1	Aug 23 1985		Brief amicus curiae of Minnesota, et al. filed.
2	Aug 23 1985		Brief amicus curiae of National Board YWCA of the USA, et al. filed.
3	Sep 11 1985		SET FOR ARGUMENT. Wednesday, November 6, 1985. (2nd case).
4	Sep 12 1985		CIRCULATED.
5	Sep 18 1985		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
6	Oct 12 1985		Original & 12 copies of respondents' 2nd lodging received.
7	Oct 21 1985	X	Reply brief of petitioners Wendy Wygant, et al. filed.
8	Nov 6 1985		ARGUED.
9	Nov 6 1985		ARGUED.

84-1340

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CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does the Constitution tolerate racial preferences for teacher layoffs adopted by a public employer in the absence of findings of past discrimination, based solely upon a disparity between the respective percentages of minority faculty and students?

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OPINIONS BELOW

The opinion of which review is sought is reported as *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984), and is reproduced at pages 2-19a of the Appendix. The district court opinion is reported at 546 F. Supp. 1195 (E.D. Mich. 1982), and is included at pages 20-36a.

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JURISDICTION

The Sixth Circuit Court of Appeals decided this case and entered judgment on October 25, 1984. By order of this Court entered by Justice Sandra Day O'Connor on January 7, 1985, the time for filing this Petition was extended to and including February 22, 1985.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1976).

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based upon the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The principal statutory provision involved is 42 U.S.C. § 1983 (1978), which provides in pertinent part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

> . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. Facts and Background.

This case presents a constitutional challenge to racial preferences adopted by the Respondents and a teachers' union which resulted in the layoff of Petitioners from their jobs as public schoolteachers.

The racial preferences [set out at App. 1a] were first adopted in the 1972-73 collective bargaining agreement between Respondent Jackson Board of Education and the Jackson Education Association [App. 22a]. The preferences have been renewed essentially intact in successive agreements and presently continue in effect.

Specifically, Article XII.B.1 creates an exception to the otherwise applicable rule of seniority-based layoffs (last-hired, first-fired), to the effect that non-minority teachers with greater seniority shall be laid off when necessary to preserve the existing proportion of minority teachers. The racial preferences, as described by the district court, were designed to

> 1) retain a sufficient number of minority teachers so that the racial composition of the Jackson School District faculty will roughly approximate that of the student body, or 2) if that ratio has not yet been achieved, then at least to prevent a reduction in the minority to majority ratio.

[App. 32a.]

The racial preferences were adopted solely to eliminate a statistical disparity between the student and faculty minority populations. In 1969, blacks comprised 15.2% of the student body and 3.9% of the faculty. Thereupon, the school board endeavored to increase minority faculty representation. [App. 41-42a.] By 1971, the last year for which statistics are present in the record, minority representation in the student body remained relatively constant at 15.9%, while the proportion of minority schoolteachers had more than doubled to 8.3 - 8.5%. [App. 21a, 41a.] In spite of this noteworthy increase in minority faculty in only two years, the racial preferences were adopted the following year. The stated goal of the racial preferences is to achieve a racial balance, i.e., "to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools." [App. 22a.]

The racial preferences are not remedial in nature, and their benefits are not limited to identified victims of past discrimination. Neither Respondents nor any court has made specific findings of past discrimination. [App. 40a.] In fact, the teachers' union sued the school board in 1974 to compel it to enforce the preferential layoff provision, and attempted to prove that the board had engaged in past discrimination based upon the same statistical disparity upon which the racial preferences are premised. In *Jackson Education Association v. Board of Education of the Jackson Public Schools,* No. 4-72340 (E.D. Mich.

Dec. 15, 1976) [App. 36-45a], the court rejected the union's discrimination claims, holding that

> [t]he difficulty with plaintiffs' argument is that it assumes that the *de facto* imbalance disclosed by the statistical data in and of itself demonstrates a violation of the Fourteenth Amendment's equal protection clause. This simply is not so.

[App. 42-43a.] Consequently, *there are no findings of past discrimination in the record, and the only court to review the evidence declined to make such findings.*

Petitioners were laid off pursuant to the racial preferences contained in the contract. They filed their Complaint in federal district court in September 1981, invoking jurisdiction based on, *inter alia,* 42 U.S.C. § 1983. Although nine of the ten Petitioners have since been restored to teaching positions, all have outstanding claims for back pay and seniority, and the issues are ripe for resolution. [App. 3a.]

B. Decisions Below.

The district court decided the case on cross-motions for summary judgment. Applying *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), *reh'g denied,* 444 U.S. 889 (1980), the court determined at the outset that findings of past discrimination are unnecessary to sustain voluntarily adopted racial preferences. [App. 27a.] Eschewing a comparison between minority personnel and the relevant labor pool [App. 29a], the court instead compared the minority student and faculty populations. The court contended that this comparison was proper because "[t]eachers are role-models for their students." [*Id.*] Based on the statistical disparity between

these two groups, the court concluded that minority underrepresentation was substantial and chronic, thus justifying adoption of racial preferences. [App. 30a.] Finally, the court analyzed the racial preferences under a "reasonableness" standard [App. 31a], and pronounced them constitutional. [App. 34a.]

The Sixth Circuit affirmed, adopting both the result and reasoning of the district court. [App. 10a.] Judge Wellford concurred, but disagreed with the statistical comparison applied by the Sixth Circuit in sustaining the racial preferences. [App. 16a.] He noted that if relevant labor market statistics were in the record, the court "may well have been required to reverse," [App. 17a], and concluded that the district court's analysis on this point was "simply improper." [App. 19a.]

Petitioners request that this honorable Court review and reverse the opinion of the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS HAVE CREATED A DIRECT, IRRECONCILABLE CONFLICT OVER WHETHER PUBLIC EMPLOYERS MAY ADOPT RACIAL PREFERENCES SOLELY ON THE BASIS OF STATISTICAL DISPARITIES AND WITHOUT FINDINGS OF PAST DISCRIMINATION.

A. Decisions Of The Sixth And Seventh Circuits Squarely Conflict.

The principal issue in this case is the power of municipal governments to voluntarily adopt racial preferences in

public employment. The recent statement of the United States Civil Rights Commission, which implored this Court to resolve this question, underscores its vital importance.[1]

This is the very issue explicitly left open by this Court in previous cases: "[T]he line of demarcation between permissible and impermissible affirmative action plans." *Weber,* 443 U.S. at 208; *see also Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S. Ct. 2576, 2590 (1984).

In resolving this issue, the decision below squarely conflicts with the holding of *Janowiak v. City of South Bend,* 36 FEP Cases (BNA) 737 (7th Cir. 1984), *petition for reh'g en banc filed,* No. 84-1321 (Jan. 7, 1985). Specifically, the Sixth and Seventh Circuits reached opposite conclusions on whether a public employer may adopt racial preferences solely on the basis of statistical disparities and without findings of past discrimination.

The Sixth Circuit below sustained a race-preferential layoff scheme set out in the collective bargaining agreement between the school board and the teachers' union.

---

[1]The Commission declared that,

> Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and . . . offend the Constitutional principle of equal protection of the law for all citizens.

Statement of the U.S. Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota, January 17, 1984, pp. 3-4. Unbridled racial preferences inflict adverse consequences on numerous individuals. For instance, the Equal Employment Opportunity Commission, reports that in 1979-83 alone, white males filed 1,556 formal complaints alleging racial discrimination against public employers. EEOC, Freedom of Information Act request no. 83-8-FOIA-148.

The racial preference is not designed to provide relief to actual individual victims of past discrimination, but rather to achieve and maintain a racial balance so that the proportion of minority teachers mirrors the proportion of minorities in the student body. [App. 32a.]

There are no admissions or findings of past discrimination by the school board. [App. 40a.] The Sixth Circuit below upheld the racial preference based solely on a disparity between the respective ratios of minorities in the teaching staff and student body, which in the court's view demonstrates that underrepresentation of minority personnel is substantial and chronic. [App. 9a.] This statistical disparity is the only evidence of discrimination in the record, and was held insufficient to establish a constitutional violation in a related case. [App. 43a.]

The Sixth Circuit analysis relies on this Court's decision in *Weber,* although it concedes that this case involves a public employer and requires constitutional analysis.[2] [App. 4-5a.] The Court construed *Weber* to permit voluntary racial preferences even in the absence of prior judicial findings of past discrimination. [App. 4a.] Consequently, the Sixth Circuit held the racial preference constitutional. [App. 12a.]

The Seventh Circuit, facing the same issue, reached the opposite result in *Janowiak v. City of South Bend.* The preferential hiring program before the Seventh Cir-

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[2]Justice Rehnquist observes that this Court has never held that *Weber,* which was expressly limited to private employers and Title VII, applies equally to public employers and constitutional analysis. *Bushey v. New York State Civil Service Commission,* — U.S. —, 53 U.S.L.W. 3477, 3478 (Jan. 8, 1985) (*cert. denied*) (Rehnquist, J., dissenting).

cuit was adopted, as here, solely on the basis of statistical disparities and without findings of past discrimination. *Id.* at 738. While the Seventh Circuit also applied *Weber,* it construed it differently than the Sixth Circuit, concluding that the holding therein hinged upon findings of past intentional discrimination by the employer. *Id.* at 741.

In direct contrast to the decision of the Sixth Circuit, the Seventh Circuit held that the racial preference before it was invalid under both Title VII and the Fourteenth Amendment, declaring that

> the government must demonstrate that its remedial program responds to a finding of past discrimination .... Under the more exacting constitutional standard, this court now holds that *evidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against non-minorities.*

Id. at 742-43 (emphasis added). The reason for mandating such findings, in the view of the Seventh Circuit, is to ensure that the racial preferences are remedial in nature, and not simply " 'new forms of invidious discrimination approved in the guise of remedial affirmative action.' " *Id.* at 743 (quoting *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1981) (findings of past discrimination are necessary to justify an affirmative action plan)).

TABLE A

COMPARISON OF SIXTH AND SEVENTH CIRCUIT DECISIONS

POINT OF COMPARISON	*Wygant v. Jackson Board of Education*	*Janowiak v. City of South Bend*
1. Public or private employer?	public	public
2. Type of challenge	equal protection	equal protection and Title VII
3. Analysis applied	*United Steelworkers of America v. Weber,* 443 U.S. 193 (1979)	*United Steelworkers of America v. Weber,* 443 U.S. 193 (1979)
4. Source of racial preference	collective bargaining agreement	Board of Public Safety affirmative action plan
5. Job classification	teachers	police officers and fire fighters
6. Method of implementation at issue	preferential layoffs	preferential hiring
7. Goal of plan	to reflect minority composition of the student body	to reflect minority composition of the City
8. Findings of past discrimination?	NO	NO
9. Justification for plan	statistical disparities only	statistical disparities only
10. Additional evidence of past discrimination?	NO	NO
11. Tailored to relevant labor market?	NO	NO
12. Are beneficiaries actual victims of past discrimination?	NO	NO
HOLDING	**CONSTITUTIONAL**	**UNCONSTITUTIONAL AND VIOLATIVE OF TITLE VII**

The conflicting holdings of the Sixth and Seventh Circuits are irreconcilable.[3] The Sixth Circuit is satisfied to approve racial preferences in public employment that are not tailored to remedy identified past discrimination, based solely upon a statistical disparity between the racial composition of students and faculty. Conversely, the Seventh Circuit believes that racial preferences are tolerable only if they are truly remedial in nature, and holds that statistical disparities are an inadequate justification in the absence of specific findings of past discrimination.

These conflicts beg resolution of the issues previously left open by this Court.

B. This Court's Lack Of Guidance In Limiting Racial Preferences By Public Employers Has Produced Conflicts And Confusion In The Circuits.

At least five circuits have recently noted that this Court has not articulated standards by which the limits on racial preferences by public employees may be defined. *Williams v. City of New Orleans*, 729 F.2d 1554, 1567-68 (5th Cir. 1984) (*en banc*) (Higginbotham, J., specially concurring); *Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 703 (1984), *reh'g denied*, 104 S.Ct. 1431 (1984); *Janowiak v. City of South Bend*, 36 FEP Cases at 742 (7th Cir.); *Valentine v. Smith*, 654 F.2d at 508 (8th Cir.); *Johnson v. Transportation Agency*, 36 FEP Cases (BNA) 725, 728 (9th Cir. 1984). Fifth Circuit Judge Higginbotham has expressed grave concern over attempting to interpret this

[3]The facts and holdings of these decisions are summarized in Table A, *supra*.

Court's "sometimes inscrutable trilogy" of cases governing racial preferences.[4]

This uncertainty manifests itself in conflicting approaches among and within the circuits.[5] Such confusion pervades the Sixth Circuit itself. Its decision below that a school board may properly seek to balance its minority teacher and student populations is an explicit departure from its own rule set out in *Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), that racial preferences should be tailored to the relevant labor market.[6] [App. 9a.] Moreover, as Judge Wellford observed, such a balance was expressly rejected by the Sixth Circuit in *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757, 762 (6th Cir. 1983).[7] [App. 16-17a (Wellford, J., concurring).]

[4]*Weber; Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[5]The extraordinary divergence in views that invariably results from the absence of a definitive ruling by this Court is perhaps best illustrated by *Williams v. City of New Orleans*. In that case, the Fifth Circuit affirmed the trial court's refusal to approve a consent decree provision that imposed a racial quota for promotions on the ground that it was not tailored to the relevant labor market and that it inflicted an "inordinately harsh impact on non-black[s]." 729 F.2d at 1562-63. The *en banc* review produced four separate opinions. Three judges joined in the court's judgment upholding the district court's exercise of discretion, four judges concurred in the result on the ground that the quota was flatly unconstitutional, and six judges dissented.

[6]Comparisons between student and faculty populations have been explicitly rejected by the Fifth Circuit as a basis for identifying discrimination in teacher employment. *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133, 1138 (5th Cir. 1981); *Castaneda v. Pickard*, 648 F.2d 989, 1002 (5th Cir. 1981).

[7]Judge Wellford noted that if relevant labor market statistics were before the court, it "may well have been required to reverse under the rationale of *Oliver*." [App. 17a.]

The Sixth Circuit's contradictory and revisionist interpretation of equal protection principles is a source of concern among district courts bound by it. In *Marsh v. Board of Education,* 581 F. Supp. 614, 627 (E.D. Mich. 1984), *appeal docketed,* No. 84-1240 (6th Cir. Apr. 4, 1984), Judge Newblatt upheld the demotion of a high school guidance counselor pursuant to a racial quota that was neither temporary nor the least burdensome alternative, since "[i]t is all too clear that the leeway given to affirmative action in the Sixth Circuit is wide enough to save the present [program]." Consequently, the court was "compelled . . . to place its imprimatur on an explicit act of racial discrimination visited on an American citizen." *Id.* at 628.

The multiple and inconsistent holdings of the various circuits inevitably produce intolerable conflicts, such as the instant conflict between the Sixth and Seventh Circuits. Clearly, the need for concrete direction by this Court is critical.

II. THE DECISION BELOW DEPARTS FROM ESTABLISHED CONSTITUTIONAL PRINCIPLES.

A. The Sixth Circuit Substitutes Traditional Strict Scrutiny With A "Reasonableness" Standard.

Just last term, this Court reaffirmed its well-established view that racial classifications "are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of [their] legitimate purpose . . . ." *Palmore v. Sidoti,* — U.S. —, 104 S.Ct. 1879, 1882 (1984). As in *Palmore,* this case "raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race." *Id.* at 1881.

In the area of "reverse discrimination," this Court has consistently invoked a heightened standard of constitutional review. In *Bakke,* Justice Powell declared that

> [t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . . Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

438 U.S. at 289-91. Similarly, Chief Justice Burger confirmed in *Fullilove,* 448 U.S. at 491, that "preference[s] based on racial or ethnic criteria must necessarily receive a most searching examination . . .," and Justices Stewart, Rehnquist, and Stevens clearly articulated the traditional strict scrutiny standard in separate dissenting opinions. *Id.* at 526, 537.

Conversely, the Sixth Circuit has flatly rejected strict scrutiny, claiming that "the Supreme Court has failed to set out a binding standard," *Bratton v. City of Detroit,* 704 F.2d at 886 n.26, and disposing of *Fullilove* as "a plurality decision with little precedential value." *Id.* at 885. Consequently, the Sixth Circuit herein applied a nebulous "reasonableness" standard. [App. 10a.] Petitioners submit that this creative interpretation of the Fourteenth Amendment not only dictated the result in the instant case, but also creates an alarming precedent by discarding the vital principle that "[i]f both are not accorded the same protection, then it is not equal." *Bakke,* 438 U.S. at 290.

The relaxed standard of review adopted by the Sixth Circuit directly contradicts the holdings of this Court which sustain the principle of equal opportunity, and thus commends this case for review.

B. The Decision Below Conflicts With The Requirement That Racial Preferences Must Be Remedial In Nature.

The Sixth Circuit below approved governmentally adopted racial preferences in the absence of findings of past discrimination. In direct contrast, this Court has held that such a program "cannnot pass muster unless . . . it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing . . . remedial objectives." *Fullilove*, 448 U.S. at 487.

Thus, Justice Powell has observed that "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." *Id.* at 497 (Powell, J., concurring); *accord Bushey v. New York State Civil Service Commission*, 53 U.S.L.W. at 3478 (Rehnquist, J., dissenting). Such findings are necessary to ensure that racial preferences are truly remedial. Race-conscious remedies are "necessarily designed . . . to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

In contradiction, the Sixth Circuit below dispensed with this requirement. It justifies its sanction of the racial preferences by carving out an unprecedented exception in the context of teacher employment to allow such preferences to be sustained upon a mere showing of a statistical disparity between minority student and faculty populations. [App. 8a.] However, it was in the very context of teacher employment that this Court in *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977), cautioned that in identifying discrimination,

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

Comparisons to the student body, as opposed to the general population, have *even less* probative value. *See, e.g., Fort Bend Independent School District v. City of Stafford*, 651 F.2d at 1138.[8]

Moreover, the Sixth Circuit requires no findings that the racial preferences are limited to providing relief to individual victims of past discrimination. Yet, it was precisely the exclusion of non-victims from the benefits of racial preferences that this Court deemed a critical feature in sustaining the minority set-aside in *Fullilove*, 448 U.S. at 486-87.[9] Instead, the racial preferences herein have the same effect as the one struck down in *Williams v. New Orleans*, 729 F.2d at 1569 (Higginbotham, J., specially concurring), in which the "quota made no effort to correlate prior victim status to future advantage; to be black *ipso facto* would be to benefit under this plan."

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[8]The Sixth Circuit's view that such a comparison is valid because teachers provide "role-models" for students [App. 8a] is inconsistent with its earlier holding in *Oliver*, 706 F.2d at 762, that minority students do not have a constitutional right to proportional representation among the faculty.

[9]Similarly, in *Stotts*, 104 S. Ct. at 2588, this Court held that "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice has had an impact on him." The Sixth Circuit herein declined to apply *Stotts* to this case [App. 12a], although it did directly apply *Weber*, which is also a pure Title VII case. [App. 5a.] Petitioners question the Sixth Circuit's selective use of Title VII precedents in constitutional analysis, under which *Weber* is applied to uphold racial preferences while the limitations of *Stotts* are avoided.

The Sixth Circuit has clearly departed from this Court's mandate that racial preferences must be narrowly tailored to remedial objectives, and its decision consequently begs review. These issues will remain divisive and unsettled until addressed by this Court.

III. THE CASE IS RIPE FOR REVIEW.

This case presents constitutional issues in a context amenable to prompt resolution by this Court. It meets the ripeness standards presented in *Stotts,* 104 S.Ct. at 2583-85: (1) the layoff provision has continuing effect, (2) there is no assurance that Respondents will not enforce the provision in the future, and (3) there are unresolved back pay and seniority claims. Accordingly, the case is ripe for review.

CONCLUSION

The decision below squarely conflicts with decisions of other circuits as well as those of this Court. The issues herein are of vital concern, both to the nation as a whole as well as to individual victims of discrimination, including the Petitioners. For these reasons, Petitioners respectfully urge this Court to grant the Petition.

Respectfully submitted,

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1972-73 TEACHER CONTRACT
(Relevant Provisions)

ARTICLE VII.D.1. The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. *The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.* (Emphasis added).

ARTICLE VII.D.2. In order that this goal be expeditiously met, it is agreed that, for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies. The Board will annually review each individual staff to ensure proper minority representation.

ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will be there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance. (Emphasis added).

No. 82-1746

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Appeal from the United States District Court
for the Eastern District of Michigan.

Wendy Wygant, Leonard Bluhm, Susan Lamm, John Krenkel, Florence Csage, Karen Smith, Susan Diebold, Deborah Brezezinski, Kathleen Crecine, Gordon Holton, Cheryl Zaski, Robert L. Staska, David P. Kiesel, Paula Janke, Martha Verhoeven, Perry Maynard, Mary O'Dell and Ruth Ann Anderson,

Plaintiffs-Appellants,

v.

Jackson Board of Education, Jackson, Michigan, and Richard Surbrook, President and Don Penson, Robert Moles, Melvin Harris, Cecelia Fiery, Sadie Barham, and Robert F. Cole,

Defendants-Appellees.

Decided and Filed October 25, 1984

Before: Edwards and Wellford, Circuit Judges; and Peck, Senior Circuit Judge.

Edwards, Circuit Judge, delivered the opinion of the Court in which Peck, Senior Circuit Judge, concurred. Wellford, Circuit Judge (pp. 14-17) delivered a separate concurring opinion.

George Clifton Edwards, Jr., Circuit Judge.

This is a school case tangentially involving segregation in public schools—this concerning a formula for layoff of

teachers of minority races during economically required reductions in staff. The disputed formula is contained in the collective bargaining contract executed between the Jackson Teachers Association and the Board of Education of the City of Jackson, Michigan. It reads as follows:

> ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance. (Emphasis added).

Appellants, who object to the Board's following this provision, contend that the quoted provision violates both federal and state statutory and constitutional provisions, including particularly the fourteenth amendment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981); 42 U.S.C. §§ 1981, 1983 and 1985 (1976 & Supp. V 1981).

While, at oral argument, this court was advised that due to somewhat improved economic conditions, only one teacher assignment is as a practical matter currently involved, the fundamental dispute over the validity of Art. XII.B.1. is still before us.

The District Judge who heard this case wrote a careful opinion upholding the validity of the layoff system adopted by the School Board and the Federation of Teach-

ers. We quote in part *Wygant v. Jackson Board of Education,* 546 F.Supp. 1195 (E.D.Mich.1982) as follows:

> "Plaintiffs argue first that they are entitled to summary judgment because an employer and a union cannot lawfully negotiate a voluntary affirmative action plan which gives preferential treatment to minorities, where there has been no judicial finding of past employer discrimination. Stated in other words, plaintiffs argue that societal discrimination, as opposed to identifiable employer discrimination, is not a lawful basis for the adoption of a voluntary affirmative action plan.
>
> "*United Steelworkers of America v. Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) held that Title VII does not prohibit a private employer from voluntarily adopting an affirmative action plan 'to eliminate conspicuous racial imbalance in traditionally segregated job categories.' 443 U.S. at 209, 99 S.Ct. at 2730. In *Weber,* there was no judicial finding that the private employer, Kaiser Aluminum, had ever engaged in race discrimination. However, Kaiser's work force statistics for the years prior to the adoption of the affirmative action plan pointed up gross disparities between the number of blacks employed by Kaiser and the number of blacks in the relevant labor market. Thus, *Weber* stands for the proposition that Title VII does not require a judicial finding of employer discrimination before a private sector employer may adopt an affirmative action plan.

> "*Detroit Police Officers' Association v. Young,* 608 F.2d 671 (6th Cir.1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), extended this particular holding of *Weber* to public sector employers *and* to alleged Constitutional violations.
>
> "In *Young,* the Detroit Police Department, after an internal determination that blacks were underrepresented in the department, voluntarily adopted an affirmative action program which promoted black patrolmen to sergeant ahead of white patrolmen who were higher on the eligibility list. The white officers challenged the affirmative promotion plan on Title VII and Equal Protection grounds. The Sixth Circuit relied on *Weber* to hold that the internal determination of racial disparities justified the voluntary plan, even though there had been no prior judicial determination of race discrimination.
>
> > "[D]iscriminatory acts which might not give rise to legal liability may nonetheless be sufficient to justify a voluntary remedial affirmative action plan. . . As Justice Blackmun noted in his concurring opinion in *Weber,* a preferential hiring plan which seeks to alleviate an imbalance caused by traditional practices of job segregation is a reasonable voluntary response 'whether or not a court, on these facts, could order the same step as a remedy' . . . Under *Weber,* the district court's holding that 'quota relief, when fashioned by the employer without the assistance and direction of the court, is not permitted . . .' . . . cannot stand as a matter of law. 608 F.2d at 689-90.

"Having thus held on the Title VII claim, the *Young* court applied the same principle to the Constitutional challenge.

> "It was also error to require that there be judicial determination of past discrimination for a state to undertake a race-conscious remedy, as stated by the district court. This requirement would be 'self-defeating' and would 'severely undermine' voluntary remedial efforts. [Citing *Regents of the University of California v. Bakke,* 438 U.S. 265, 364, 98 S.Ct. 2733, 2785, 57 L.Ed.2d 750 (1978)].

"[1] Thus, it appears that plaintiffs' contention that the affirmative action plan at issue here cannot stand because there has been no prior judicial determination that the defendants engaged in racial discrimination, is without merit. Plaintiffs' motion for summary judgment on this ground is denied.

"b. Constitutionality of
Affirmative Action Plan

"Having determined that a judicial finding that defendants engaged in race discrimination is not a prerequisite to adoption of the affirmative action at issue here, the court must still determine whether the plan is one permitted by the Constitution.

"As an initial matter, there must be some evidence that minority teachers have not enjoyed the same representation on the faculty of the Jackson Public Schools as have white teachers. Justice Brennan, for the majority

in *Weber,* adhered closely to the facts of that case and framed this requirement in terms of 'conspicuous racial imbalance in traditionally segregated job categories.' 443 U.S. at 209, 99 S.Ct. at 2730. Justice Blackmun, in concurrence in *Weber,* held out for an 'arguable violation' standard. In other words, employers and unions which had committed 'arguable violations' of Title VII would be free to adopt voluntary affirmative action plans without fear of Title VII liability to whites.

"For the purposes of the Equal Protection clause of the Constitution, the *Young* court stated this requirement as follows: 'whether "there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities . . .,"' 608 F.2d at 694. The standard was adopted directly from the opinion of Justices Brennan, White, Marshall and Blackmun in *Bakke.*

> "The *Young* court expressly held that: [I]t was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for "it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.' 608 F.2d at 694.

"The reason for this requirement is to permit the court to determine that the purpose of the affirmative action plan is legitimate. *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981).

"The requirement of some showing of previous underrepresentation of minorities must, of course, be adapted

to the facts and circumstances of the particular case. In both *Weber* and *Young* it was appropriate, when searching for evidence of past discrimination, to compare the percentage of blacks in the employer's work force with the percentage of blacks in the relevant labor pool. For example, prior to the adoption of the affirmative action plan challenged in *Weber,* 1.83 percent of Kaiser-Aluminum's skilled workers were black while the relevant work force was 39 percent black. 433 U.S. at 198-99, 99 S.Ct. at 2724.

"However, in the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models. *See, Oliver v. Kalamazoo Board of Education,* 498 F.Supp. 732, 748 (W.D.Mich. 1980) ('faculty ought to begin to approximate the percentage of minority students in the district').

"[2] Because of this one vitally important aspect of the teaching profession, the court holds that in applying the *Young* 'substantial underrepresentation' standard, it may compare the percentage of minority faculty with the percentage of minorities in the student body, rather than the Jackson School Board and the Jackson Education Association to voluntarily adopt, through collective bar-

with the percentage of minorities in the relevant labor pool.[1]

"Applying this standard, it is clear that minority teachers were "substantially" and "chronically" underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan. In 1953, there were no black teachers and by 1961, only 1.8 percent of the faculty was black. The court has not been provided with figures establishing the percentage of black students in the Jackson School District during these years.

"[3] However, by the school year 1968-69, black students made up 15.2 percent of the total student population, while black faculty members constituted only 3.9 percent of the total teaching staff. While the percentage of minority students remained relatively constant (15.9 percent in 1971), the percentage of minority faculty members increased, but only to 5.5 percent in 1970-71 and 8.3-8.8 percent in 1971-72.[3] These findings were made by the school board and the court holds that the school board was competent to make such findings. *Regents of University of California v. Bakke, supra,* 438 U.S. at 363-64, 98 S.Ct. at 2785; *see also, McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

"[4] The court finds that this is 'substantial' and 'chronic' underrepresentation within the meaning of *Young.* Thus, the Fourteenth Amendment would permit

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[1]We agree with the concurring opinion insofar as it asserts substantial underrepresentation was established by plaintiffs. We find it unnecessary, however, to reach the question of whether the District Court properly utilized a minority student ratio. No such issue was presented.

the Jackson School Board and the Jackson Education Association to voluntarily adopt, through collective bargaining negotiations, an affirmative action plan to protect minority teachers from the effects of layoffs.

"The objective of this affirmative action plan to remedy past 'substantial' and 'chronic' underrepresentation of minority teachers on the Jackson School District faculty is plainly constitutional. *Valentine v. Smith, supra,* at 509. Therefore, the only remaining question is whether the means adopted by the Jackson School Board to achieve its objective are constitutional.

"[5] The test is one of reasonableness. *Detroit Police Officers' Association v. Young, supra,* at 694, 696. The reasonableness test asks whether the affirmative action plan is 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation. *Id.* at 696; *Valentine v. Smith, supra,* at 510; *U.S. v. City of Miami,* 614 F.2d 1322, 1338-40 (5th Cir. 1980). *See also, Regents of the University of California v. Bakke, supra,* 438 U.S. at 359, 98 S.Ct. at 2783, *Fullilove v. Klutznick,* 448 U.S. 448, 482-92, 100 S.Ct. 2758, 2776-2782, 65 L.Ed.2d 902 (1980)."

546 F. Supp. at 1199-1202.

We agree with and adopt Judge Joiner's conclusions as stated above.

Appellants contend, among other things, that this court's opinion in *Oliver v. Kalamazoo Board of Education,* 706 F.2d 757 (6th Cir. 1983) (*Oliver II*) (decided

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[3]The 8.3 percent figure appears in the affidavit of Susan Diebold, one of the plaintiffs. The other figures appear in the affivadit of Jane I. Phelps, custodian of employment and student records and coordinator of personnel operations for the Jackson Public Schools.

after Judge Joiner's opinion in this case), requires our reversal of the District Court's opinion.

We do not believe that *Oliver II* controls this case. The school board (and the bargaining representative of the teachers) have a legitimate interest in curing the past racial isolation of black teachers in the school system concerned. No undue stigma attaches in the instant case. We recognize that on the record before us, at least one white school teacher, presumably entirely innocent of any racial discrimination, has suffered by being displaced by the plan which plaintiffs attack here. The Supreme Court has, however, previously recognized that "[w]hen effectuating a limited and properly-tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Fullilove v. Klutznick,* 448 U.S. 448, 484, 100 S.Ct. 2758, 2778, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.).

This court's recent opinion in *Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984), reaffirming our earlier decision in *Detroit Police Officers' Association v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), supports and strengthens the result reached by Judge Joiner.

As was true in the two cases cited above, in our instant case the Board of Education and its bargaining agent had a legitimate interest in the remedial plan which was jointly adopted. Here the school board's interests in eliminating historic discrimination, promoting racial harmony in the community and providing role models for minority students are among the justifications available to support the layoff provisions.

Finally, the district judge appropriately held that there was no basis for the exercise of pendent jurisdiction over appellants' state claims upon dismissal of the federal cause of action. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

In this case a local school board and its teacher bargaining representative have adopted a protective collective bargaining contract containing a provision as to teachers in racial minority status. They have done so voluntarily to cure faculty racial imbalance and as a matter of educational policy. We believe that it is within the power and authority of the parties to this agreement so to do, and that their action is in no respect in violation of the United States Constitution or federal law.

The Supreme Court of the United States has just decided *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), and we have considered the possible impact of this decision upon our instant appeal. We conclude that *Stotts* does not require any revision or change of result in the opinion above. The affirmative action plan involved in our instant case was not the product of any court order. It resulted from voluntary decisions in the collective bargaining process between the school board and the bargaining agent for the teachers. We do not read *Stotts* as barring this form of affirmative action.

The majority opinion in *Stotts* specifically declined to decide the issue with which we are confronted. It said:

> Finally, the Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objection.

— U.S. at —, 104 S.Ct. at 2590. (footnote omitted).

Nor does the *Stotts* case overrule *United Steelworkers v. Weber,* 443 U.S. 193 (1979). This prior Supreme Court decision was relied upon by the District Court in this case. In *United Steelworkers v. Weber,* the Supreme Court declined to "condemn all private, voluntary, race-conscious affirmative action plans." 443 U.S. at 208, 99 S.Ct. at 2729.

It may be appropriate to point out in this context that the collective bargaining contract containing the disputed layoff provision was adopted in 1972. The full provisions which bear on our present discussion are as follows:

> ARTICLE VII.D.1. The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. *The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.*
>
> ARTICLE VII.D.2. In order that this goal be expeditiously met, it is agreed that, for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies. The Board will annually review each individual staff to ensure proper minority representation.
>
> ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through

> layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance.

The contract containing these provisions, is "a voluntary, race-conscious affirmative action plan." It was adopted by a majority vote of the Jackson Teachers Association as well as by the Jackson Board of Education.

Judge Wellford's concurring opinion concludes "I would AFFIRM the decision that this voluntary affirmative action layoff system, subjected to collective bargaining safeguards, was sufficient to meet the challenge presented by plaintiffs." This is a good summary of this majority opinion's rationale as well as that of Judge Wellford's concurrence. The majority opinion is not, however intended, as Judge Wellford seems to imply, to overrule *Oliver v. Kalamazoo Board of Education,* 706 F.2d 757 (6th Cir. 1983), either directly or sub silentio. The agreement which the School Board and the Jackson Teachers Association (set out in full on pages 7 and 8 of this opinion) was *voluntarily* entered into by the Jackson Board of Education and the Jackson Teachers' union. Neither Judge Joiner nor this court has held that its adoption was constitutionally mandated. This opinion does imply that that agreement is constitutionally permissible. It is also a collective bargaining contract enforceable as a voluntary affirmative action plan designed to remedy past obvious race discrimination and to meet the practical problems posed by racial tensions engendered by that history.

What this court ruled in the *Kalamazoo* case was that the District Court did not have the constitutional authority to design and order the remedy of a 20% hiring quota for black teachers disregarding the contractual and legal seniority and tenure rights of white teachers who would be displaced. In this regard, it seems to have anticipated the opinion of the majority of the Supreme Court in *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984).

The principle involved in both cases seems to be that voluntary affirmative action plans contracted between the parties are easier to defend in the courts than those mandated ab initio by federal trial courts.

The judgment of the District Court is affirmed.

Wellford, Circuit Judge, concurring.

I concur in the result reached in this case, but I write separately in an effort to address an issue which the majority expressly refuses to answer. *See supra* note 1.

Judge Edwards has cited at length from the decision of the trial judge, and has agreed with and adopted Judge Joiner's conclusions. My problem with this determination is that Judge Joiner expressly relied upon *Oliver v. Kalamazoo Board of Education,* 498 F.Supp. 732 (W.D. Mich. 1980), in stating a proposition essential to his decision:

> [I]n the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because

> teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models. *See, Oliver v. Kalamazoo Board of Education,* 498 F.Supp. 732, 748 (W.D.Mich. 1980) ("faculty ought to begin to approximate the percentage of minority students in the district").

Wygant v. Jackson Board of Education, 546 F. Supp. 1195, 1201 (E.D. Mich. 1982).

This court, however, reversed the trial court in *Oliver.* In doing so it was made clear that comparing the percentage of minority teachers to the percentage of minority students and then requiring a minority quota of teachers based on the latter proportion was not only *not* constitutionally mandated, it was inappropriate under the circumstances because the court had ignored the practicalities of the situation in the school district. *Oliver v. Kalamazoo Board of Education,* 706 F.2d 757, 762 (6th Cir. 1983). *See also International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 375, 97 S.Ct. 1843, 1874, 52 L.Ed.2d 396 (1977) (court should take practicalities into account in devising remedies under Title VII and in any equitable decree.)

This court, moreover, in reversing the trial court in the *Oliver* case, stated:

> In most school desegregation cases, as in this one, *see* 498 F.Supp. at 746, 751, the constitutional rights to be vindicated are those of the students, not of the teachers or potential teachers. *The students, however, do not have a constitutional right to attend a school with a teaching staff of any particular racial composition. See Fort Bend Independent School District v. City of Stafford,* 651 F.2d 1133 (5th Cir. 1981) (holding that the percentage of minority faculty need not approximate the percentage of minority students). Rather, with respect to the teaching staff, all that the students are entitled to is the "sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices." *Id.* at 1140.

706 F.2d at 762 (footnote omitted) (emphasis added).

This court, then, in citing with approval *Fort Bend Independent School District v. City of Stafford,* 651 F.2d 1133, (5th Cir. 1981), a case decided after the district court decision in *Oliver,* held that there is no constitutional right to attend a school with a minority teacher ratio the same as the minority ratio of students. So long as the school district, over a period of years, had voluntarily hired minority teachers without evidence of discrimination, it was erroneous to impose a quota system utilizing the minority student ratio as the minimum quota for minority teachers. *Oliver,* 706 F.2d at 763. The court, rather, advised:

> But, generally, the wiser approach is a more flexible affirmative action program rather than a hiring quota. *Cf. University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (affirmative action admission programs of educational institutions may take race into account, but racial quotas are prohibited).

Id. at 763.

Had the plaintiffs in this case presented data as to the percentage of qualified minority teachers in the relevant labor market to show that defendant Board's hiring of black teachers over a number of years had equaled that figure, I believe this court may well have been required to reverse under the rationale of *Oliver.* For example,

had defendant shown that from 1969 to 1972 the qualified minority teacher ratio in the relevant market was 10% and that 16% of its teachers hired were a minority, the rationale of *Oliver* would have brought the contract provision at issue into very serious question. *See United Steelworkers v. Weber,* 443 U.S. 193, 209, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979), (Court indicated that a showing of "conspicuous racial imbalance" was required). It is a close case, moreover, as to whether the data which was presented was sufficient under *Oliver* standards.[1]

The case relied upon by the trial judge and the panel majority, *Detroit Police Ass'n v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), based its decision upon a comparison of hiring of minorities and the Detroit SMSA labor market ratio of eligible minorities in the Detroit Police Force. Thus, *Young* utilized an available, reasonable labor base of eligible minority workers, not the general population of the city served by the police force. The metropolitan labor market should be the "proper comparison." *See Young,* 608 F.2d at 688, and *Hazelwood School District v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 2743, 53 L.Ed.2d 768 (1977).

> There can be no doubt, in light of the *Teamsters* case, that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Ap-

[1]Judge Joiner conceded that from 1968-1969 to 1971-1972 the ratio of black minority teaching staff rose from 3.9% to between 8.3% and 8.8% in the Jackson School District. In *Oliver,* the minority ratio, of teachers in the Kalamazoo School District rose from 6.5% to 11.5% between 1970-1971 and March, 1979.

> peals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market. *See Teamsters, supra,* [431 U.S.] at 337-338, and n.17 [97 S.Ct. at 1855-1856 and n.17]. The percentage of Negroes on Hazelwood's teaching staff in 1972-1973 was 1.4% [431 U.S.] and in 1973-1974 it was 1.8%. By contrast, the percentage of qualified Negro teachers in the area was, according to the 1970 census, at least 5.7%.

Hazelwood School District, 433 U.S. at 308, 97 S.Ct. at 2741-42 (footnotes omitted). Underrepresentation, then, of minority teachers as found by Judge Joiner based on a student minority ratio was simply improper under *Oliver* and *Hazelwood; Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir.), *vacated in part on reh'g,* 712 F.2d 222 (1983), *cert. denied,* — U.S. —, 104 S.Ct. 703, 79 L.Ed.2d 168, *reh'g denied,* — U.S. —, 104 S.Ct. 1431, 79 L.Ed.2d 754 (1984), was decided prior to our decision in *Oliver* and cannot override *Hazelwood* on this issue.

I would AFFIRM the decision that this voluntary affirmative action layoff system, subjected to collective bargaining safeguards, was sufficient to meet the challenge presented by plaintiffs.

I concur with the majority that there was no basis for the exercise of pendent jurisdiction under *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Wendy WYGANT, et al., Plaintiffs,

v.

JACKSON BOARD OF EDUCATION,
et al., Defendants.

Civ. A. No. 81-60156.

United States District Court,
E. D. Michigan, S. D.

Sept. 7, 1982.

MEMORANDUM OPINION AND ORDER

JOINER, District Judge.

This action is brought by nineteen (19) non-minority school teachers employed by the Jackson Board of Education. Plaintiffs assert various constitutional and statutory claims against the defendants, the Jackson Board of Education and its individual members. The case is now before the court on cross-motions for summary judgment. For the reasons given below, defendants' motion is granted and plaintiffs' motion is denied.

FACTS

The roots of this case reach nearly thirty (30) years into the past. It will be helpful, in coming to grips with the problems posed by this case, to review that past. The following statement of facts is adapted from defendants' brief and is not disputed by the plaintiffs.

Before 1953, no black teachers were employed by the Jackson Public Schools. In that year, the first black school teacher was hired. She was one of sixty-one (61) new hires for the 1953-54 school year. By 1961, ten (10) teachers on the staff of 515 were minorities for a minority to majority ratio of 1.8 percent.

By 1969, black students constituted 15.2 percent of the total student population, while black teachers constituted on 3.9 percent of the total teaching staff. It appears that only in 1969 did the Jackson School District seriously turn its attention to the problem of underrepresentation of minorities on the faculty.

In October, 1969, the Superintendent's Professional Staff Ad Hoc Committee recommended that each of Jackson's 22 elementary schools include at least two minority faculty members within one year. The Executive Secretary of the Jackson Education Association (JEA) was a member of that committee.[1] Since only three of the 22 elementary schools then had at least two minority faculty members, implementation of the Committee's recommendation would have required the School Board to hire 40 new minority teachers within one year. The Committee's recommendation was rejected.

Over the next two years, a Citizens School's Advisory Committee, and a Professional Council made up of school administrators and representatives of JEA, studied the problem. By November, 1971, 15.9 percent of the student body was minority, while only 8.3-8.5 percent of the faculty was minority. At that time, the collective bargaining agreement between JEA and the Board of Education mandated that layoffs be imposed on a straight seniority basis. That is, the last hired were the first to be fired.

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1. JEA has served as the collective bargaining representative for all Jackson school teachers since 1966.

In January, 1972, the Minority Affairs Office of the Jackson Public Schools solicited the views of all teachers on the district's layoff policy. Ninety-six (96) percent of the teachers expressed a preference for the straight seniority system and opposed a system that would freeze minority layoffs. In this atmosphere, contract negotiations were commenced in the spring, 1972.

In retrospect, 1972 appears to have been a critical year for the Jackson School District. In February, race tensions boiled over and violence broke out at the Jackson High School. In the spring, a tentative agreement was reached by JEA and the Board of Education on a new contract, a contract which included increased protection from layoffs for newly hired minority teachers. In September, the teachers returned to work, even though the collective bargaining agreement had not yet been ratified. In the late fall, the teachers struck for a short period of time. Finally, in late fall, the contract for the 1972-73 school year was ratified.

The relevant provisions of that contract have been continued through to the contract challenged in this action and read as follows:

> ARTICLE VII.D.1. The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. *The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.* (Emphasis added).

> ARTICLE VII.D.2. In order that this goal be expeditiously met, it is agreed that, for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies. The Board will annually review each individual staff to ensure proper minority representation.
>
> ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance. (Emphasis added).

In spring, 1973, layoffs were required and the contract language was followed. However, in spring, 1974, the School Board ignored the language of the contract in imposing layoffs. It retained tenured teachers and failed to maintain the percentage of minority personnel which existed at the time of the layoff. As a result, a group of minority teachers sued in federal district court. Judge DeMascio of the Eastern District of Michigan retained the civil rights claims but remanded the breach of contract claims to Jackson County Circuit Court.

In *Jackson Education Association v. Board of Education of Jackson Public Schools,* No. 77-0011484 CZ (Jackson County Cir. Ct., 1979), Judge Britten found that Art. XII.B.1. of the contract did not violate Title VII of the Civil Rights Act of 1964 or the Fourteenth Amendment.

Chastened, the Board apparently adhered to the letter of the contract when layoffs were next required. That course of action led to this lawsuit.

One group of plaintiffs—Wygant, Lamm, Krenkel, Csage, Smith, Diebold, Brzezinski, Crecine, Holton and Zaski—allege that on April 7, 1981, they were notified that they would be terminated for the 1981-82 school year and possibly indefinitely. They allege that they have been displaced by minority teachers or by the effects of the minority retention provisions of the collective bargaining agreement.

A second group of plaintiffs—Bluhm, Burnette, Staska, Kiesel, Janke, Verhoeven, Maynard and Odell—challenge layoffs which occurred much earlier. They allege that they were displaced by minority teachers with less seniority for various periods of time during the 1976-77 school year.

The plaintiff Ruth Ann Anderson is named in the caption to the complaint, but is not again mentioned. Presumably she belongs to one of the two groups described above, and she will be so treated.

Plaintiffs have challenged their layoffs on a variety of statutory and constitutional theories:

1. Equal Protection, U.S.Const. amend. XIV, § 1.
2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*
3. 42 U.S.C. § 1981.
4. 42 U.S.C. § 1983.
5. 42 U.S.C. § 1985.

6. Equal Protection, Mich.Const. art. I, § 2.
7. Elliott-Larsen Civil Rights Act, M.C.L.A. § 37.2101 *et seq.*
8. Teachers' Tenure Act, M.C.L.A. § 38.71 *et seq.*
9. Fair Employment Practices Act, M.C.L.A. § 423.-301 *et seq.*[2]

The defendants have moved for summary judgment on or dismissal of all these claims on various grounds. Plaintiffs have countered with their own summary judgment motion. The parties are agreed that the relevant facts are not in dispute. Therefore, the various motions and countermotions will be addressed and ruled on point by point.

DISCUSSION

1. Equal Protection, U.S.Const. amend. XIV, § 1.

a. Prior Judicial Finding of Past Employer Discrimination as Prerequisite to Adoption of Affirmative Action Plan

Plaintiffs argue first that they are entitled to summary judgment because an employer and a union cannot lawfully negotiate a voluntary affirmative action plan which gives preferential treatment to minorities, where there has been no judicial finding of past employer discrimination. Stated in other words, plaintiffs argue that societal discrimination, as opposed to identifiable em-

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2. The Fair Employment Practices Act was repealed by Mich. P.A.1976, No. 453, § 804 (Eff. March 31, 1977). It has largely been replaced by the Elliott Larsen Civil Rights Act, M.C.L.A. § 37.2101 *et seq.* It is not a proper basis for this lawsuit and will not be considered further in this opinion.

ployer discrimination, is not a lawful basis for the adoption of a voluntary affirmative action plan.

United Steelworkers of America v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) held that Title VII does not prohibit a private employer from voluntarily adopting an affirmative action plan "to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209, 99 S.Ct. at 2730. In *Weber,* there was no judicial finding that the private employer, Kaiser Aluminum, had ever engaged in race discrimination. However, Kaiser's work force statistics for the years prior to the adoption of the affirmative action plan pointed up gross disparities between the number of blacks employed by Kaiser and the number of blacks in the relevant labor market. Thus, *Weber* stands for the proposition that Title VII does not require a judicial finding of employer discrimination before a private sector employer may adopt an affirmative action plan.

Detroit Police Officers' Association v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), extended this particular holding of *Weber* to public sector employers *and* to alleged Constitutional violations.

In *Young,* the Detroit Police Department, after an internal determination that blacks were underrepresented in the department, voluntarily adopted an affirmative action program which promoted black patrolmen to sergeant ahead of white patrolmen who were higher on the eligibility list. The white officers challenged the affirmative promotion plan on Title VII and Equal Protection grounds. The Sixth Circuit relied on *Weber* to hold that the internal

determination of racial disparities justified the voluntary plan, even though there had been no prior judicial determination of race discrimination.

> [D]iscriminatory acts which might not give rise to legal liability may nonetheless be sufficient to justify a voluntary remedial affirmative action plan. . . As Justice Blackmun noted in his concurring opinion in *Weber,* a preferential hiring plan which seeks to alleviate an imbalance caused by traditional practices of job segregation is a reasonable voluntary response "whether or not a court, on these facts, could order the same step as a remedy" . . . Under *Weber,* the district court's holding that "quota relief, when fashioned by the employer without the assistance and direction of the court, is not permitted . . ." . . . cannot stand as a matter of law. 608 F.2d at 689-90.

Having thus held on the Title VII claim, the *Young* court applied the same principle to the Constitutional challenge.

> It was also error to require that there be judicial determination of past discrimination for a state to undertake a race-conscious remedy, as stated by the district court. This requirement would be "self-defeating" and would "severely undermine" voluntary remedial efforts. [Citing *Regents of the University of California v. Bakke,* 438 U.S. 265, 364, 98 S.Ct. 2733, 2785, 57 L.Ed.2d 750 (1978)].

[1] Thus, it appears that plaintiffs' contention that the affirmative action plan at issue here cannot stand because there has been no prior judicial determination that the defendants engaged in racial discrimination, is without merit. Plaintiffs' motion for summary judgment on this ground is denied.

b. Constitutionality of Affirmative Action Plan

Having determined that a judicial finding that defendants engaged in race discrimination is not a prerequisite to adoption of the affirmative action at issue here, the court must still determine whether the plan is one permitted by the Constitution.

As an initial matter, there must be some evidence that minority teachers have not enjoyed the same representation on the faculty of the Jackson Public Schools as have white teachers. Justice Brennan, for the majority in *Weber,* adhered closely to the facts of that case and framed this requirement in terms of "conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209, 99 S.Ct. at 2730. Justice Blackmun, in concurrence in *Weber,* held out for an "arguable violation" standard. In other words, employers and unions which had committed "arguable violations" of Title VII would be free to adopt voluntary affirmative action plans without fear of Title VII liability to whites.

For purposes of the Equal Protection clause of the Constitution, the *Young* court stated this requirement as follows: "whether 'there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities. . .'" 608 F.2d at 694. The standard was adopted directly from the opinion of Justices Brennan, White, Marshall and Blackmun in *Bakke.*

The *Young* court expressly held that:

> [I]t was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for "it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." 608 F.2d at 694.

The reason for this requirement is to permit the court to determine that the purpose of the affirmative action plan is legitimate. *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* — U.S. —, 102 S.Ct. 972, 71 L.Ed. 2d 111 (1981).

The requirement of some showing of previous underrepresentation of minorities must, of course, be adopted to the facts and circumstances of the particular case. In both *Weber* and *Young* it was appropriate, when searching for evidence of past discrimination, to compare the percentage of blacks in the employer's work force with the percentage of blacks in the relevant labor pool. For example, prior to the adoption of the affirmative action plan challenged in *Weber,* 1.83 percent of Kaiser-Aluminum's skilled workers were black while the relevant work force was 39 percent black. 443 U.S. at 198-99, 99 S.Ct. at 2724.

However, in the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models. *See, Oliver v. Kalamazoo Board of Education,* 498 F.Supp. 732, 748 (W.D.Mich.1980) ("fac-

ulty ought to begin to approximate the percentage of minority students in the district").

[2] Because of this one vitally important aspect of the teaching profession, the court holds that in applying the *Young* "substantial underrepresentation" standard, it may compare the percentage of minority faculty with the percentage of minorities in the student body, rather than with the percentage of minorities in the relevant labor pool.

Applying this standard, it is clear that minority teachers were "substantially" and "chronically" underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan. In 1953, there were no black teachers and by 1961, only 1.8 percent of the faculty was black. The court has not been provided with figures establishing the percentage of black students in the Jackson School District during these years.

[3] However, by the school year 1968-69, black students made up 15.2 percent of the total student population, while black faculty members constituted only 3.9 percent of the total teaching staff. While the percentage of minority students remained relatively constant (15.9 percent in 1971), the percentage of minority faculty members increased, but only to 5.5 percent in 1970-71 and 8.3-8.8 percent in 1971-72.[3] These findings were made by the school board and the court holds that the school board was competent to make such findings. *Regents of University of California v. Bakke, supra,* 438 U.S. at 363-64, 98 S.Ct. at 2785; *see also, McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

3. The 8.3 percent figure appears in the affidavit of Susan Diebold, one of the plaintiffs. The other figures appear in the affidavit of Jane I. Phelps, custodian of employment and student records and coordinator of personnel operations for the Jackson Public Schools.

[4] The court finds that this is "substantial" and "chronic" underrepresentation within the meaning of *Young.* Thus, the Fourteenth Amendment would permit the Jackson School Board and the Jackson Education Association to voluntarily adopt, through collective bargaining negotiations, an affirmative action plan to protect minority teachers from the effects of layoffs.

The objective of this affirmative action plan to remedy past "substantial" and "chronic" underrepresentation of minority teachers on the Jackson School District faculty is plainly constitutional. *Valentine v. Smith, supra,* at 509. Therefore, the only remaining question is whether the means adopted by the Jackson School Board to achieve its objective are constitutional.

[5] The test is one of reasonableness. *Detroit Police Officers' Association v. Young, supra,* at 694, 696. The reasonableness test asks whether the affirmative action plan is "substantially related" to the objectives of remedying past discrimination and correcting "substantial" and "chronic" underrepresentation. *Id.* at 696; *Valentine v. Smith, supra,* at 510; *U.S. v. City of Miami,* 614 F.2d 1322, 1338-40 (5th Cir. 1980). *See also, Regents of the University of California v. Bakke, supra,* 438 U.S. at 359, 98 S.Ct. at 2783, *Fullilove v. Klutznick,* 448 U.S. 448, 482-92, 100 S.Ct. 2758, 2776-2782, 65 L.Ed.2d 902 (1980).

[6] The court finds that the affirmative action layoff provisions of the collectively-bargained contract be-

tween the defendants and JEA are substantially related to constitutional objectives. Therefore, the plan is constitutional.

First, the plan is designed to either 1) retain a sufficient number of minority teachers so that the racial composition of the Jackson School District faculty will roughly approximate that of the student body, or 2) if that ratio has not yet been achieved, then at least to prevent a reduction in the minority to majority ratio. *See, Valentine v. Smith, supra,* at 510-11; *United Steelworkers v. Weber, supra,* at 208, 99 S.Ct. at 2729; *Detroit Police Officers' Association v. Young, supra,* at 696. In practice, the affirmative action layoff provision prevents the loss of minority hiring gains, which is an express policy and goal of the contract. Art. VII.D.2. Clearly, the Board could and did act to increase the number of minority teachers. The layoff provision simply operates to implement that policy. The layoff provision does not *require* that the percentage of minority teachers retained equal or approximate the percentage of minorities in the student body. Rather, it seeks only to prevent the loss in minority hiring gains achieved through operation of the Board's affirmative hiring policy.

Second there is no suggestion that the affirmative action layoff provision is anything more than a temporary measure. *United Steelworkers v. Weber, supra,* at 208, 99 S.Ct. at 2729; *Valentine v. Smith, supra,* at 510-11. In fact, the layoff provisions are part of a collectively-bargained contract of limited duration. These provisions, presumably like all other provisions in the contract, are subject to change whenever the contract is renegotiated.

Third, the layoff provisions do not require the retention of unqualified teachers. *Valentine v. Smith, supra,* at 510-11. A layoff provision, by definition, applies only to those previously hired and, presumably, previously found qualified.

Fourth, the layoff provision does not require the layoff of all white teachers or otherwise unnecessarily or invidiously trammel their interests. *Valentine v. Smith, supra,* at 510-11; *United Steelworkers v. Weber, supra,* at 208, 99 S.Ct. at 2729. Clearly, an affirmative action plan is not invalid merely because some innocent persons bear the brunt of the racial preference. *Fullilove v. Klutznick, supra,* at 484, 100 S.Ct. at 2777; *Valentine v. Smith, supra* at 511. Here, no white teacher is stigmatized by operation of the layoff provision. Layoffs are usually required either because a school district is financially strapped, or because student enrollment has declined. Layoffs of the sort contemplated by Art. XII.B.1. of the contract are not related to merit.

Furthermore, Art. XII.B.1. does not oust white teachers and replace them with new minority hires, nor does it absolutely bar laid off white teachers from ever again working for the Jackson School District. *See United Steelworkers v. Weber, supra,* at 208, 99 S.Ct. at 2729.

Finally, it is undeniable that the contract, and thus the challenged layoff provision, was collectively bargained. It is difficult for the court to conceive how a plan which has been voluntarily adopted by the membership of the JEA can invidiously trammel the interests of white teachers, a majority of the JEA.

In light of all these considerations, the court concludes that Art. XII.B.1. is substantially related to admittedly proper objectives and that, therefore, the affirmative action layoff provision is constitutional.

2. Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Defendants contend that plaintiffs' Title VII claims should be dismissed because plaintiffs have not complied with administrative prerequisites. Specifically, defendants argue that plaintiffs have not produced the required notice of right-to-sue from the Equal Employment Opportunity Commission (EEOC).

[7] A Title VII action may not be filed in the district court unless the plaintiff has first filed an administrative charge with the EEOC. 42 U.S.C. § 2000e-5(f)(1). Ordinarily, a plaintiff demonstrates compliance with this requirement by securing and producing a notice of right-to-sue from the EEOC. This requirement is jurisdictional and may not be waived. *Foreman v. General Motors Corp.*, 473 F.Supp. 166 (E.D.Mich.1979).

[8] Since the plaintiffs have neither produced a notice of right-to-sue from the EEOC, nor otherwise alleged that the administrative prerequisites of Title VII have been fulfilled, all Title VII claims must be dismissed for lack or jurisdiction. Fed.R.Civ.P. 12(b)(1).

3. § 1981, § 1983, § 1985

It follows from the court's holding as to plaintiffs' Equal Protection claims, that the defendants must also be granted summary judgment on plaintiffs' § 1981, § 1983 and § 1985 claims.

[9] Section 1981 forbids with some specificity, what the Constitution forbids generally. *Detroit Police Officers' Association v. Young, supra,* at 692. It also permits what the Constitution permits. *Id.* at 692. Therefore, an affirmative action plan of a governmental employer that passes constitutional muster does not violate § 1981. *Id.; Valentine v. Smith, supra,* at 512. Since the court has already determined that the affirmative action plan did not violate the Equal Protection clause of the Constitution, plaintiffs' § 1981 claims must be dismissed.

[10] The same is true of plaintiffs' § 1983 claims. Section 1983 provides a remedy for any person deprived under color of law of "any rights, privileges, or immunities secured by the Constitution and laws." The only conceivable right, privilege or immunity that plaintiffs could have been deprived of was their Constitutional right to equal protection of the laws. However, the court has held that the affirmative action plan at issue did not deprive them of that right. Therefore, defendants are entitled to summary judgment on plaintiffs' § 1983 claims.

[11] Plaintiffs have not specified which subsection of § 1985 they are suing under. However, the court assumes the plaintiffs are suing under § 1985(3) which provides a remedy for conspiracies to deprive a person or class of persons "of the equal protection of the laws, or of equal privileges and immunities under the laws." Since the court has already held that plaintiffs have not been denied their rights to equal protection, it follows that defendants cannot be liable under § 1985(3). Defendants are entitled to summary judgment on the § 1985 claims.

[12] Furthermore, even if defendants were not entitled to summary judgment, plaintiffs' § 1985(3) claims would have to be dismissed because plaintiffs have failed to state a claim. Fed.R.Civ.P. 12(b)(6). A "conspiracy" is an essential element of a § 1985 claim. *Griffin v. Breckinridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971). Plaintiffs have not alleged that defendants engaged in a conspiracy.

4. State Constitutional and Statutory Claims

[13] As all plaintiffs' federal claims have been dismissed, there is no basis for the court to assert jurisdiction over plaintiffs' state law claims. Therefore, plaintiffs' claims under the Michigan Constitution, the Elliott-Larsen Civil Rights Act, and the Teachers' Tenure Act, must be dismissed. *United Mineworkers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

So ordered.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 4-72340

THE JACKSON EDUCATION ASSOCIATION, INC., a non-profit Michigan corporation, LINDA BENSON, and VIRGINIA DAVIS,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE JACKSON PUBLIC SCHOOLS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Jackson Education Association, Inc. (Association), plaintiff herein, filed this suit on August 30, 1974 for itself and on behalf of Linda Benson and Virginia Davis, two black school teachers employed by defendant, the Board of Education of the Jackson Public Schools (Board). The Association is a labor organization within the meaning of Michigan's Public Employment Relations Act, M.C.L.A. § 423.201, *et seq.,* and is the exclusive bargaining agent, *see* M.C.L.A. § 423.211, for the teachers employed by the Board. The first count in the complaint filed by the Association alleges that, on September 7, 1973, the Association and the Board entered into a collective bargaining agreement effective as of September 1, 1973; that the employment practices of the Board, prior to the execution of the collective bargaining agreement, had, *inter alia,* the effect of discriminating against the employment of minority groups; and that, as a consequence of the alleged discriminatory employment practices, the parties agreed to include the following provision in the collective bargaining agreement:

> The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are black, American Indian, Oriental, or of Spanish descendency. The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools. (Article VII, ¶E.)

Count I also alleges that the parties agreed to the following provision as part of the proper layoff procedure:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance. (Article XII, ¶B, subparagraph 1.)

Count I further alleges that, on or about April 8, 1974, the Board took formal action to lay off seventy-five teachers (pursuant to its estimate that that many teaching positions had to be eliminated), including plaintiffs Davis and Benson; that nineteen of the seventy-five teachers originally laid off were "minority group personnel" within the meaning of the collective bargaining agreement; that the Board failed to maintain the proper percentage of minority group personnel (the proper percentage, pursuant to Article XII, paragraph E, was 9.4%, the "percentage of minority group personnel employed at the time of the layoff") because of its decision to retain eleven non-minority teachers that had achieved tenure status under the Michigan Teacher Tenure Act, M.C.L.A. § 38.71, *et seq.* (the Act), and to lay off eleven minority group teachers that had not yet achieved tenure under the Act (these eleven were on probationary status).

The second count of the complaint alleges only that the Board, in laying off plaintiffs Davis and Benson, violated Article XII, paragraph B of the collective bargaining agreement, and that as a direct result of this breach, plaintiffs suffered damages, including the loss of pay. Plaintiffs' prayer for relief seeks only that the court find that the Board breached Article XII, paragraph B of the collective bargaining agreement by failing to maintain the proper percentage of minority group personnel because of the layoff of plaintiffs Benson and Davis; that the court declare Article XII, paragraph B of the collective bargaining agreement to be not contrary to the provisions of the Teacher Tenure Act; that the court enjoin the Board from further violating the provisions of Article XII, paragraph B, *i.e.*, that the court restrain the Board from laying off a greater percentage of minority group personnel than the percentage of minority group personnel employed at the time of any future layoff; and that plaintiffs Davis and Benson[1] be awarded damages (for expenses incurred as a result of defendant's alleged breach of contract), back pay, reinstatement to their jobs, and "such other relief as may be just and equitable in the eyes of this Court."[2]

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[1]All of the minority group personnel originally laid off in 1974 have been recalled with the exception of plaintiff Benson, who remains on the Systems Layoff Recall List although she has found alternative employment for the 1974-76 school years. Defendant contends that plaintiff Benson resigned her position to obtain full-time employment elsewhere and that plaintiff Davis taught in a program that had been abolished.

[2]The collective bargaining agreement under which this dispute arose was replaced by a successor agreement on September 1, 1975. The same language relating to layoff procedures was retained in the successor agreement. See Exhibit 13, Article XII, paragraph B, and affirmative action language was added to the existing contract. In the Spring of 1975, the Board laid off eighteen teachers but, in doing so, the language of the contract was followed.

The Board admits all of the averments in the complaint except the allegation that, prior to the making of the collective bargaining agreement in September 1973, it had engaged in employment practices discriminatory to minority groups, and that such alleged discriminatory employment practices caused the alleged relative underemployment of minority group personnel. Defendant asserts, moreover, that its actions in laying off a greater percentage of minority group personnel than the total percentage of minority group personnel employed at the time of the layoff were compelled by the provisions of the Teacher Tenure Act, so that it could not adhere to the contract language which it views as contrary to, and subordinate to, the laws of the State of Michigan.

The trial of this cause was ordered bifurcated, and on March 31, 1976, the court held a bench trial on the liability issue. Just prior to trial, plaintiff filed an amendment to paragraph A of Count I of the complaint.[3] At trial, plaintiffs offered the testimony of the Executive Director of the Association and fifteen exhibits were admitted into evidence together with certain deposition testimony. At

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[3]Although the proposed amendment was filed on the first day of trial without leave of the court, we treat it as properly filed. The amendment seeks to include an allegation that the court properly has jurisdiction over the action pursuant to Title VII. As amended, paragraph A of Count I reads:

> A. This Court has original jurisdiction of the action here brought under the provisions of the United States Code, Title 28, 1343(3) and 1343(4) and under United States Code, Title 28, 1331, based upon violations of rights secured by and arising out of statutes (e.g., United States Code, Title 42, Section 2000d and 2000e-2(a) (1) and (2)) and the Constitution of the United States. The amount in controversy exceeds the sum or value of ten thousand ($10,000.00) dollars, exclusive of interest and costs.

the conclusion of the trial, the cause was taken under advisement for preparation of the court's findings of fact and conclusions of law. When the court examined the evidence, it questioned its jurisdiction over this cause on its own motion.[4] The parties were requested to submit briefs on that issue and they did so; after much consideration the court has concluded that it lacks jurisdiction over the subject matter of this action.[5]

In support of their allegations that defendant engaged in employment practices, prior to the making of the 1972 collective bargaining contract, that resulted in hiring policies discriminatory to minority personnel, *see* Complaint, Count I, paragraph F, plaintiffs submitted Exhibits 14 and 15. Exhibit 14, supplied by the Board, merely sets forth the student racial mix and the number of minority teachers contained in the total teaching faculty.[6] The evidence further demonstrated that the first black teacher in the City of Jackson was not hired until 1953. Following the 1968-69 academic year, the Board attempted to increase the percentage of minority teachers, causing the minority staff ratio to increase from 3.9% to 8.8% over

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[4]The Board did not raise the jurisdictional issue prior to or during the trial. It addressed itself to the jurisdictional issue only after the court raised it *sua sponte*.

[5]Plaintiffs once again have sought to amend their complaint in an attempt to confer jurisdiction upon the court. To their brief on the jurisdictional issue, plaintiffs attached a motion for leave to amend their complaint to allege a violation of 42 U.S.C. § 1981.

[6]Exhibit 15 represents an extension of the data contained in Exhibit 14. For example, Exhibit 14 sets forth the percentage of minority students contained in the total student enrollment together with the percentage of minority teachers employed by the Board.

the next three years. The Board did not begin to maintain student minority ratio statistics until the 1968-69 academic year. In 1972, Dr. Lawrence Read, then the superintendent of schools, reported the recommendations of the desegregation subcommittee to the members of the Board. One of these recommendations suggested that:

> . . . the Board of Education direct the school administration to work towards a teaching staff, in the elementary schools, that also achieves a racial balance as close as possible to that of the students with a minimum of two black teachers in every school.

It is interesting to note that the evidence also demonstrated that there were not enough black teachers in the school system at that time to implement this recommendation.

Plaintiffs argue that the statistical data submitted in exhibit form sufficiently establish that the Board engaged in discriminatory hiring practices;[7] that these allegations of racial discrimination in violation of the fourteenth amendment are sufficient to confer jurisdiction over this cause upon the court; that, once having established that this court has jurisdiction pursuant to the fourteenth amendment, the court has pendent jurisdiction to resolve their claims that the Board breached the collective bargaining agreement, the sole claims set forth by the complaint. The difficulty with plaintiffs' argument is that it assumes that the *de facto* imbalance disclosed by the

---

[7]Plaintiffs admit that when Dr. Lawrence Read became superintendent, the Board began a real effort to end the racial imbalance in the student enrollment at each school and in the teaching staff. Plaintiffs argue, however, that, notwithstanding the valiant efforts of Dr. Read, the racial imbalance situation has not been rectified.

statistical data in and of itself demonstrates a violation of the fourteenth amendment's equal protection clause. This simply is not so. *Washington v. Davis,* 44 U.S.L.W. 4789 (U.S. June 7, 1976). It is true, however, that statistical evidence may demonstrate that hiring and promotion practices of an employer have a racially differential impact sufficient to make out a *prima facie* case under Title VII. *See, e.g., Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971); *Robinson v. City of Dallas,* 514 F.2d 1271, 1272-73 (5th Cir. 1975).[8] The plaintiffs, however, have not demonstrated that they fulfilled the jurisdictional prerequisites for a Title VII suit—they did not allege or demonstrate that discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC), that they received a right-to-sue letter from EEOC, or that they timely acted upon a right-to-sue letter. 42 U.S.C. §2000e-5. *See, e.g., Alexander v. Gardner-Denver Corp.,* 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798 (1973).

The proofs presented at trial were not directed at establishing violations of the fourteenth amendment, Title VII, or any other statute forbidding racial discrimination. Nor did plaintiffs ever make averments sufficient to establish such violations. The complaint, as well as the proofs offered at trial, demonstrated that this dispute

---

[8]This is not to say, however, that statistical evidence tending to demonstrate a racially differential impact cannot be utilized in a non-Title VII racial discrimination case. In *Washington v. Davis, supra,* the Court, in speaking of such cases, stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 44 U.S.L.W. at 4793.

centers about a conflict between the provisions of the collective bargaining agreement and state law as interpreted by defendant. Plaintiffs' contractual claim arises under state law and the parties have not shown, nor could they, that the court has jurisdiction over it. The parties are not of diverse citizenship and the contractual claim can in no way be considered pendent to any federal claim since it does not arise out of a common nucleus of operative fact. Any federal claim advanced by plaintiffs was advanced to set forth a pretextual jurisdictional basis so that the court could decide the real dispute between the parties—the contractual claim. The contract dispute is, however, a state law matter and the state courts are fully able to resolve any real or apparent conflict between the Michigan Teacher Tenure Act and the collective bargaining agreement's provisions. The court does not have jurisdiction over plaintiffs' asserted Title VII claim because of plaintiffs' total failure to comply with the jurisdictional prerequisites to a Title VII action. The complaint was amended to allege 42 U.S.C. §2000d as a jurisdictional basis, but plaintiffs made no attempt to include averments in their complaint or to introduce any evidence at trial to support such a claim.[9]

Accordingly, we conclude that the jurisdictional averments contained in the complaint are insufficient to vest

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[9]42 U.S.C. § 2000d, *et seq.*, prohibits discrimination on the basis of race, color or national origin against any person or by anyone in a program or activity receiving federal financial assistance. Here, however, plaintiffs' claim of discrimination revolves about the contractual dispute and there has been no showing whatsoever that defendant's allegedly discriminatory actions were motivated by a racial animus.

this court with jurisdiction over the Title VII cause of action asserted by plaintiff and that the non-Title VII causes of action, advanced by amendments to the complaint, are unsupported by the evidence.

/s/ Robert E. DeMascio
United States District Judge

Dated: December 15, 1976

Office-Supreme Court, U.S.
FILED
MAR 19 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1340

In The
Supreme Court of the United States
October Term, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully Submitted By:

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COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

RESPONDENT DEFENDANT-APPELLEE'S COUNTER QUESTION OF LAW

I. THAT A NEGOTIATED LAYOFF PROVISION TO PROVIDE FOR MINORITY REPRESENTATION IN THE FACULTY IS NOT OFFENSIVE TO THE CONSTITUTION AND THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS AND THE TRIAL COURT SHOULD BE SUSTAINED AND THE WRIT DENIED.

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RESPONDENT DEFENDANT-APPELLEE'S COUNTER QUESTION OF LAW:

THAT A NEGOTIATED LAYOFF PROVISION THAT SEEKS TO PROVIDE FOR MINORITY REPRESENTATION IN THE FACULTY IS NOT OFFENSIVE TO THE CONSTITUTION AND THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS AND THE TRIAL COURT SHOULD BE SUSTAINED AND THE WRIT DENIED. i

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Wygant v. Jackson Board of Education, 546 F. Supp. 1195 (E.D. Mich. 1982) 2

STATUTE:

28 U.S.C. § 1254(1) (1976) 1

JURISDICTION

Jurisdiction is proper in the court in accordance with 28 U.S.C. § 1254(1) (1976).

———o———

STATEMENT OF THE CASE

The responding Defendant-Appellee accepts the Facts and Background as set forth in the Plaintiff-Appellant Petitioner's Brief at Pages 2 through 5, however, with the additions listed in the following paragraphs:

There is no dispute in the record that the clause which is the subject matter of this litigation arises through the collective bargaining process, and that all times pertinent the Jackson Education Association was and is the certified representative of teachers in the school district. Since the contract language in the 1972-73 labor agreement, which appears in the Appendix of the petitioning Plaintiff-Appellant at Page 1a, there have been at l st three labor agreements, and the contract language which is the subject matter of this litigation remains intact.

At all times pertinent, white teachers made up a majority by 85% of the JEA, who voted for ratification of the labor agreement.

At no time since the inception of the language which is the subject matter of this lawsuit has the Union proposed its deletion from the labor agreement. Based upon the record, at Page 31a of the Appendix, Judge Joiner found that there was a substantial and chronic underrepresentation of minorities within the district. The trial court, as exhibited at Page 33a of the Appendix, found that since a majority of the employees ratifying the

labor agreement were white, that it could not be said that the Plaintiff's rights were invidiously trammeled.

It should be noted that the subject matter of language was not unilaterally imposed by the Employer, nor does it result from a court-ordered affirmative action plan, but rather, was collectively bargained by and between the Board of Education and the Plaintiff's bargaining representative, the JEA. The Plaintiffs have since the inception of this cause of action remained members of the labor organization.

———o———

REASONS FOR DENYING THE PETITION

I. That A Negotiated Layoff Provision That Seeks To provide For Minority Representation In The Faculty Is Not Offensive To The Constitution And The Decision Of The Sixth Circuit Court Of Appeals And The Trial Court Should Be Sustained And The Writ Denied.

The findings of the trial court are significant, and it was noted that before 1953 there were no black teachers employed by the Jackson Public Schools, and that by 1969 black students constituted 15.2 percent of the total student population, while black teachers constituted 3.9 percent of the total teaching staff. *Wygant v. Jackson Board of Education,* 546 F. Supp. 1195 (E.D. Mich. 1982) and Appendix 20a-21a.

The trial court noted that the genesis of the language came following a solicitation of the views of all teachers on a district layoff policy. Appendix 22a.

In supporting the plan the court noted that minority teachers were substantially and chronically underrepresented in the district and that the language negotiated by the parties, which remains extant to date, was a reasonable plan. The language is designed to retain a sufficient number of minority teachers so that the racial composition of the Jackson School District faculty will approximate that of the student body, or if a ratio is not achieved, then at least to prevent a reduction in the minority to majority ratio. In this regard the court noted it was proper in accordance with *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* — U.S. —, 102 S.Ct. 972, 71 L. Ed. 2d 111 (1981). The plan was substantially related to the objectives of remedying past discrimination and correcting substantial and chronic underrepresentation, and was therefore proper in accordance with the Sixth Circuit tests set forth in *Detroit Police Officers' Ass'n v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L. Ed. 2d 951 (1981).

Clearly, this court's decision in *United Steelworkers of America v. Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L. Ed. 2d 480 (1979), made it clear that Title VII does not prohibit a private employer from voluntarily adopting an affirmative action plan to eliminate conspicuous racial imbalance in traditionally segregated job categories. 443 U.S., p. 209, 99 S.Ct., p. 2730. The facts in *Weber* made it clear that there was no judicial finding that the private employer, Kaiser Aluminum, had ever engaged in race discrimination. There were however gross disparities between the number of blacks employed by Kaiser and the number of blacks in the relevant labor market. In the *Young* case, the court found that discriminatory acts

which might not give rise to legal liability may nonetheless be sufficient to justify a voluntary remedial affirmative action plan. 608 F.2d, pp. 689-690. The requirement of court intervention was treated as self-defeating by this court in *Regents of the University of California v. Bakke,* 438 U.S. 265, 364, 98 S.Ct. 2733, 2785, 57 L. Ed. 2d 750 (1978).

This court's decision in *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S.Ct. 2576, 81 L. Ed. 2d 483 (1984) deals with a court-ordered affirmative action plan and not a plan negotiated by the representative of the Plaintiffs, who stand in the majority, and their Employer. This court's opinion in *Stotts* does not ban negotiated affirmative action layoff language, although heartily in all four cases, this court approved a set-aside requirement of at least 10 percent of public funds granted for local public works projects for purchase for minority-owned businesses, and found the same to not violate the equal protection clause in *Fullilove v. Klutznick,* 448 U.S. 448, 48 U.S.L.W. 4979 (1980), and recently, the Philadelphia School District's plan, which maintained a faculty ratio at each school of between 75 and 125 percent of system-wide promotions of white and black teachers, so that the racial composition of each school faculty reflects that of the overall teaching staff, was found to be constitutionally sound and not prohibited by Title VII, even in the light of *Firefighters v. Stotts, supra.* 51 U.S.L.W. 2441, 53 U.S.L.W. 2056. The Third Circuit in reaching this decision distinguished *Stotts,* in that in *Kromnick* the issue did not involve a court order forbidding race-conscious layoffs in controvention of seniority rights. Unlike *Stotts,* Petitioner would ask this Court to invalidate

the lay-off procedure negotiated by the Union and Employer.

It should be noted that Plaintiffs bring their case under the Fourteenth Amendment and not under Title VII, and that therefore the distinction between *Stotts* and the case at bar should be viewed in the light of the Sixth Circuit's recent decision in *NAACP v. Detroit Police Officers Ass'n,* 53 U.S.L.W. 2065. The trial court's finding of the language being a temporary measure is supported by the fact that it is part of a collective bargaining agreement which has an existence of no more than three years of duration. As a result, the test should meet the challenge of a temporary measure in accordance with *Tangren v. Wackenhut Servs.,* 658 F.2d 705 (9th Cir. 1981); *Valentine v. Smith, supra; United Steel Workers of America v. Weber, supra.* The Defendant-Appellee Respondent would suggest that the tests set forth in the plan itself comply with the tests suggested by Justices Brennan, White, Marshall, and Blackmun in *Bakke,* and particularly in the light of the fact that the measure is temporary and that laid-off teachers are not stigmatized by the layoff language at issue. Further, the layoff provision does not require the layoff of all white teachers. The provision was adopted by a white majority. The language is designed to protect against wiping out minority hiring gains. The language does not require the retention of unqualified teachers. In this sense the test set forth by Justice Powell, at 438 U.S., p. 305, 57 L. Ed. 2d, p. 781, would appear to be met. Justice Powell did not suggest that the only time an affirmative action plan could be adopted would be after a judicial finding, and in *Bakke* numerous suggestions were offered by Justice Powell to the contrary. 438 U.S., p. 302 n. 41; 57 L. Ed. 2d, p. 779, n. 41.

CONCLUSION

The Defendant-Appellee Respondent asks that this court deny the Petitioner's Writ of Certiorari. The lay-off plan negotiated by the Union and Employer does not violate the Fourteenth Amendment and is not repugnant to it, is for a limited duration, and was approved by a substantial majority of white teachers. The language which is the subject matter of this litigation has existed since 1972, having been ratified by the parties in successor agreements. As noted by the Court of Appeals when the matter was argued before it, but one white teacher, Plaintiff of the group of Plaintiffs, remained unemployed as a result of the use of the language, Appendix 3a. The issue, although not moot, comes close to it, and the language provided has worked to protect a minority balance without doing harm to the white majority. For these reasons the Defendant-Appellee would ask that the writ be denied.

Respectfully Submitted By:

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Office Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1340

In The

Supreme Court of the United States

October Term, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President; and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed February 21, 1985
Certioari Granted April 15, 1985

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DOCKET JOURNAL ENTRIES (E.D. Mich.)

Date	NR.	Proceedings	81-6016
Sep.	4	1. Complaint filed, summons issued.	DD9/8/81
	14	2. Appearance of attorney Jerome A. Susskind for defendants and Proof of Service	DD9/14/81
	21	3. Deft's Acknowledgement and acceptance of service and notice of appearance	DD9/22/81
Oct	13	4. Defts' MOTION for Summary Judgment, BA and notice of hearing set for 12/14/81 at 9:30 A.M. and PS	DD10/14/81
Dec	14	5. MOTION for Summary Judgment and other relief by Pltfs., BA, Aff. of Service and NOTICE OF HEARING set for 12/14/81 at 9:30 AM.	DD12/14/81
Dec	14	6. Aff. of service re Motion for Summary Judgment	DD12/14/81
	14	7. CROSS MOTIONS for Summary Judgment heard and taken under advisement THORNTON	
	29	8. ORDER of Reassignment to Ann Arbor Administrative Unit, FEIKENS	DD1/4/82
Feb	9	9. Pltfs' NOTICE OF HEARING on Motion for Summary Judgment filed 12/14/82 reset for hearing before Hon. Charles W. Joiner for 2/23/82 at 2:30 PM, PS	DD2/20/82
	23	— CROSS MOTIONS for Summary Judgment heard/TAKEN UNDER ADVISEMENT by Judge Joiner	

Mar	8	10. LETTER dtd 3/3/82 re: Past decisions and how they reflect on current case before the court.	DD3/9/82
	10	11. Aff of Susan Diebold re: Minority Teachers with Seniority with Aff.	DD3/11/82
Jun	14	12. Aff. of Thomas Rasmusson re: Interpretation of seniority list.	DD6/15/82
Aug	13	13. Aff. of Jane I. Phelps re: review of records on hiring of new teachers and PS.	DD8/14/82
Sep	7	14. Memorandum Opinion and Order and Proof of Mailing	DD9/9/82
	7	15. JUDGMENT: Granting Defendants 1 through 8 MOTION for Summary Judgment and denying Plaintiffs 1 through 19 Motion for Summary Judgment re: Equal Protection, Section 1981, 1983 and 1985 claims be dismissed on the merits with prejudice and that the remaining claims be dismissed without prejudice.	DD9/9/82
	9	16. AMENDED JUDGMENT: same as above except reflecting the name of plaintiffs and defendants.	DD9/9/82
Oct	6	17 NOTICE OF APPEAL filed, fee paid (receipt A0193).	DD10/7/82
	7	— LETTER re appellate procedure, information sheet, Transcript Order Form, receipt for fee mailed to Appellant's Counsel.	

1982			
Oct	7	— LETTER Re: Designation mailed to Pltf's Counsel Warren and Deft's Counsel Thomas, with copies of docket to each.	DD10/7/82
	7	18. Clerk's PS of mailing NOTICE of Appeal.	DD10/7/82
	7	— Transmission Form to Court of Appeals w/attachments: copy of docket and pleadings #14, 15 and 16.	DD10/7/82
	14	— Transcript ordered this date, no deposit received.	SLA
	19	19. Ack. from CCA, File No. 82-1746 assigned.	DD10/20/82
	22	20. Defts' Designation of record.	DD10/22/82
	25	21. Deposit received, Transcript ordered, est. completion 11/30/82.	DD10/25/82
Nov	2	22 Pltf's Motion to withdraw or strike name of R.D. Burnette from Notice of Appeal, PS.	DD11/3/82
	2	23 LETTER dtd 11/2/82 to Pltf's counsel from K. Kircher, advising this Court cannot act on Motion to withdraw name since CCA has already received and docketed appeal, suggests same motion be submitted to CCA.	DD11/3/82
	8	24 Pltf's DESIGNATION of the Record.	DD11/10/82

17 25 LETTER dtd 11/10/82 from Pltf's counsel withdrawing Motion to Strike Name (See #23 for further information). DD11/17/82

Dec 29 26. EXTENSION of time to file transcript granted to 12/31/82. LDD1/3/83

1983

Mar 17 27. TRANSCRIPT of proceedings held 2/23/83. LDD3/17/83

Apr 8 28. Transmission of Designated Record to CCA SDD4/8/83

May 11 29. Ack. from CCA of receipt of Designated Record on 4/15/83 SDD5/11/83

1984

Oct 29 30. INFORMATION Copy from CCA—affirming the district court decision. TDD10/29/84

Nov 20 31. JUDGMENT of the said district court is hereby affirmed.
ISSUED AS MANDATE: 11/16/84
COSTS: None (file returned).
TDD11/20/84

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 81-60156

WENDY WYGANT, et al.,

Plaintiffs,

v.

JACKSON BOARD OF EDUCATION, et al.,

Defendants.

HON. CHARLES W. JOINER

JUDGMENT

Cross-motions for summary judgment were filed and heard by the court, the Honorable Charles W. Joiner presiding, and the issues were resolved in a Memorandum Opinion and Order dated September 7, 1982.

It is Ordered and Adjudged that the plaintiffs take nothing, and that the Equal Protection, § 1981, § 1983 and § 1985 claims be dismissed on the merits with prejudice, and that the remaining claims be dismissed without prejudice.

ROBERT A. MOSSING
Clerk of the Court

Approved as
to form:
/s/ cwj

/s/ By Sharon M. Bruley
Deputy Clerk

5-4-B
Form A.O. 147 (July 1953)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

CASE NO. 82-1746

APPEAL FROM

Eastern District of Michigan, S. D. at Ann Arbor

Wendy Wygant, Leonard Bluhm, Susan Lamm, John Krenkel, Florence Csage, Karen Smith, Susan Diebold, Deborah Brzezinski, Kathleen Crecine, Gordon Holton, Cheryl Zaski, Robert L. Staska, David F. Kiesel, Paula Janke, Martha Verhoeven, Perry Maynard, Mary O'Dell and Ruth Ann Anderson,

Plaintiffs-Appellants,

vs.

Jackson Board of Education, Jackson, Michigan, and Richard Surbrook, President, Don Penson, Robert Moles, Melvin Harris, Cecelia Fiery, Sadie Barham and Robert F. Cole,

Defendants-Appellees

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(C.R.) Title VII
No. Below: 81-60156
Judge Below: Joiner
Date of Judgment: September 7, 1982
Notice of Appeal Filed: October 6, 1982
Date—10/12/82
Account of Appellant—Fee paid
Received—
Disbursed—
Remarks—Certified Record returned to D.C. 11/16/84

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

Case No. 82-1746

DATE		FILINGS—PROCEEDINGS	Filed
1982			
10/12	1)	Copy of notice of appeal filed; and cause docketed	
10/18	2)	Designation of appendix by appellants (m-10/14/82)	
10/19	3)	Pre-argument statement filed	
10/27	4)	Notice from court reporter that transcript was ordered 10/14 and estimated completion date is 11/30 (50 pages)	
11/17	5)	Stipulation by both parties to withdraw the name of Ronald D. Burnette as a party plaintiff-appellant (m-11/10/82)	
11/24	6)	Order granting stipulation to withdraw name of Ronald D. Burnette (entered pursuant to Rule 4(f)	
12/27	7)	Motion: court reporter to 12/31 to file transcript (m-12/21) (0/0) (Extension to 12/31 granted; JPH/jk 12/27)	
1983			
1/31	8)	Letter to court reporter directing notification by 2/4 why transcript has not been filed	
2/10	9)	Appearance of T. Rasmusson for appellant	
2/10	10)	Appearance of J. A. Susskind for appellee	

3/14	11)	Letter to court reporter directing notification by 3/21 as to what the status is regarding transcript	
4/18		*Certified Record* (1 vol. pleadings w/1 vol. transcript) filed	
5/27		Brief (10) of appellants (m-5/27/83)	
6/13	12)	Motion: appellees to 7/25/83 for filing brief (m-6/9/83) (Denied Extension to 7/24 granted; JPH/jk 6/14)	
6/29		Brief (10) of appellees (m-6/29/83)	
7/18		Joint Appendix (5) (m-7/15/83)	
1984			
2/3	13)	Additional Citations of plaintiff (m-2/1/84)	
2/23		Cause argued by Thomas Rasmusson for appellant; by Jerome A. Susskind for appellee and case submitted to the Court (Before: Edwards, Wellford and Peck, JJ.)	
5/11	14)	Additional Citation of appellee	
10/25	15)	Judgment of the district court affirmed (Edwards, Wellford and Peck, JJ.) FP	
10/25		Opinion by Edwards, J. (Wellford, J., concurring)	
11/16	16)	Mandate issued (COSTS NONE)	
1985			
03/05	17)	SUPREME COURT NOTICE: petition for cert. filed 2/21/85 (Sp. Ct. No. 84-1340)	
04/24	18)	SUPREME COURT ORDER: cert. granted 4/15/85	
04/24		SERVICE of certified copy of Supreme Ct. ruling to Dist. Ct.	

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-1746

WENDY WYGANT, et al.,

Plaintiffs-Appellants,

vs.

JACKSON BOARD OF EDUCATION,
JACKSON, MICHIGAN, et al.,

Defendants-Appellees.

Before: EDWARDS and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

J U D G M E N T

FILED OCT. 25, 1984

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

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1972-73 TEACHER CONTRACT
(Relevant Provisions)

ARTICLE XII[1]

Continuity of Operations

A. All teachers, who are under contract, shall have a right to expect and demand that the Board will meet their contractual obligations and that any reductions in such staff for the following school year must be affected not less than sixty (60) calendar days prior to the last day of school in the current regular school year.

Supplementary contracts may be offered on a provisional basis that the Board may void the contract at any time for the following reasons:

1. Insufficient student interest in the activity.
2. Lack of funds.
3. Position is abolished. If the position is abolished after the teacher has been on the job, he will be paid on a prorated basis for the time worked.
4. A supplementary contract may be voided by a teacher giving ten (10) school days notice of his intent. Teachers taking such action relinquish any rights to that position for the balance of the school year concerned.

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[1] It is stipulated by the parties that the same language of Art. XII in the 1972-73 contract has been carried over intact into all successive labor contracts, to and including the present contract which operates until 1988.

B. Layoff Procedure

1. In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated *maintaining the above minority balance.* (emphasis added)
2. It is expressly understood that the Board may make a reasonable estimation of the positions to be eliminated based on available financial information at the time of the layoff and that it is within the Board's proper authority to reinstate eliminated positions at its discretion.
3. *Teachers who are on layoff will not accrue seniority in the district.* Seniority is defined as the length of service of a teacher since the acceptance date of his last letter of appointment for hiring. No teacher will be required to accept a position in the middle of a school year. Teachers on layoff will lose their seniority when their layoff time exceeds their seniority at the time of layoff or when they refuse call-back to a position for which they are certificated, whichever is the longer period of time. However, any teacher who refuses

a call-back during summer months shall lose all seniority. (See Letter of Intent - Page 85)

Nothing in this paragraph shall require the recall of a teacher who is not certificated for a vacancy.

4. A teacher being recalled shall have ten (10) days to notify the Board of acceptance of the position. In each case a personal contact will be made wherever possible. A teacher who is unable to be contacted shall be recalled by certified mail, and sent to the teacher's last known address, copy to be sent to the J.E.A. office on the same day. The teacher shall have ten (10) days to notify the Board of acceptance of the position from the date of postmark (stamped) on the certified receipt. The failure of a teacher to notify the Board within ten (10) days of acceptance shall be treated as terminated consistent with B, 3 of this Article. Two days before any teacher is terminated, J.E.A. will be notified of the Board's intent to terminate.

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ARTICLE VII[2]

Professional Qualifications and Assignments

A. Teachers shall not be assigned outside the scope of their teaching certificates. Exceptions may be made when agreed to by the teacher and approved by the Professional Council.

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[2] It is stipulated by the parties that the same language of Art. VII in the 1972-73 contract has been carried over intact into all successive labor contracts, to and including the present contract which operates until 1988.

B. All teachers shall be given written notice of their subjects and/or grade assignments for the forthcoming year no later than the close of the preceding school year. In the event that changes in such assignments are necessary, all teachers affected shall be consulted promptly or notified by registered mail. In the event such change comes within sixty (60) days of the start of the ensuing school year, the teacher may resign from the school district without penalty to his/her tenure status or take advantage of regular transfer procedure as outlined in Article VIII, F.

C. Any assignments in addition to the normal teaching schedule during the regular school year shall not be obligatory but shall be with the consent of the teacher.

D. 1. The Board and the Association, *in recognition of the desirability of multi-ethnic representation on the teaching faculty,* hereby declare a policy actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. *The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.* (emphasis added)

2. In order that this goal be expeditiously met, it is agreed that, *for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies.* The Board

will annually review each individual staff to ensure proper minority representation. Such report will be presented to the Association through the Professional Council. (See Letter of Intent - Page 102)

3. *It is understood that deviation beyond acceptable racial balance standards as hereinafter defined may initiate action by the Board in accordance with Article VIII, E, 2 to correct the racial balance of particular school staffs. "Acceptable racial balance standards" shall mean that the staff of a building shall not exceed a percentage of minority staff which is greater than double the overall percentage of minority teachers in the bargaining unit or be less than one-half (½) of that same percentage (by three (3) categories: elementary, middle school and high school).* (Emphasis added)

E. A refusal to teach any child or children based upon race, creed, or ethnic origin, at any school to which a teacher may be assigned shall be judged as insubordination.

F. The Board and the Association recognize that the ability of pupils to progress and mature academically is a combined result of school, home, economic and social environment and that teachers alone cannot be held accountable for all aspects of the academic achievement of the pupil in the classroom. Test results of academic progress of students shall not be used in any way as evaluative of the quality of a teacher's service or fitness for retention.

ARTICLE VIII

Vacancies, Promotions and Transfers

Definition of Vacancy

A. A vacancy in a building/grouping exists and will be posted for bids when:

1. a new classification or job is created;
2. a teacher retires, dies, or quits;
3. a teacher is discharged for just cause;
4. a teacher fills a vacancy in another building/grouping;
5. a teacher is granted a leave of absence exceeding one year;
6. all displaced teachers who have been displaced from the building during the period of the last year have been offered a chance to return to the building, provided they are qualified and certified to fill the position(s) which become available.

It is understood that internal building transfer may take place prior to the determination of the specific vacancy to be posted.

B. Whenever vacancies occur during the normal summer vacation months in addition to the normal posting as described in Section C, the following procedure will be followed:

1. Teachers with specific interests in possible vacancies will notify the Personnel Office of their

interest in writing during the last week of school and shall include an address where they can be contacted during the summer. The Personnel Office will maintain a list of the teachers and their preferences for the summer vacation period.

2. Should a vacancy occur, the teachers who have expressed a preference for that vacancy will be notified and the principal of the building concerned will receive a list of the teachers who have indicated their interest.

3. At a teacher's written request during the last week of school, the Personnel Office will mail to him/her all Professional Vacancy Notices which are posted between the last day of school and Labor Day.

C. Any vacancy occurring within the first 12 working days from the start of school shall be posted. It is understood that vacancies that are created as a result of unexpected increase in enrollment above projected enrollments will be posted within the first 12 working days after the start of school. A short posting period at this time of three (3) working days is permissible. Any vacancy occurring after 12 working days from the opening of school may be filled on a temporary basis by an applicant who either has a Michigan Provisional or Permanent Certificate, or Continuing Certificate, or who can be fully qualified for such within ninety (90) days after employment. Exceptions to the foregoing will be made in the case of teachers in the vocational training program who meet Michigan certification requirements. *In accordance*

with Article VII, paragraph D, every reasonable effort will be made to fill such vacancy with a member of a minority racial group until the provisions of Article VII, D have been fulfilled. In the event that there is no certified minority applicant available, the position may be filled by any certified applicant. In the event such teacher does not fulfill these requirements during the time period set forth, the teacher's appointment may be voided and the teacher will be placed on layoff status.

D. 1. Whenever a vacancy in any professional position in the district shall occur and where the provisions of Article VII, paragraph D, have not been met, and is indicated by official notification, the Board will give written notice of the same to the Association within seven (7) days and will post such vacancies simultaneously in each school building.

In accordance with Article VII, paragraph D, a moratorium on transfers within the district will be in effect for a period of four (4) weeks. During such four (4) weeks all reasonable efforts will be made to fill the position with a *minority applicant* holding either Michigan Provisional or Permanent Certificate, or Continuing Certificate, in the field of the vacancy or an applicant who can qualify for such certification within ninety (90) days. *In the event the vacancy is not filled with a certificated minority racial group member within four (4) weeks of such posting, the transfer and hiring procedures of this Article and*

others that are applicable shall apply. (Emphasis added).

2. The Board will support a policy of filling vacancies within the bargaining unit from within its own staff. Vacancies shall be filled based on the teaching experience in the area of assignment, the teacher's major field of specialization, and length of service in the district. In the case of high school/middle school counseling the Board may require applicants for a counseling position who do not at the time of the application hold or have held a counseling position in the district to complete an appropriate test or tests. Such test(s) shall have the approval of the Professional Council with input from current counselors.

   a. An applicant accepting a teaching assignment in a building shall be required to follow the designated educational program in that building which other teachers in the building follow. Willingness to accept such a position shall be sufficient to fulfill the preceding requirement. No efforts by any administrator shall be made to discourage a teacher from seeking or accepting a transfer because of this requirement.

   b. An applicant with less service in the district shall not be awarded such a position unless his qualifications shall be substantially superior, *except that less senior minority teachers may be appointed to such vacancies over majority teachers until such time as the*

goals of Article VII, D are reached. (Emphasis added).

Vacancies in senior high school head basketball and head football may be posted in connection with a teaching assignment currently filled by a teacher within the building (i.e., head footmall-mathematics) after the head coaching position vacancy has been posted within the building in which the vacancy occurs and after posting without recourse to dual posting within and outside of the school district. (See Letter of Understanding—Page 103)

The selection of an applicant in such a duly-posted position will be based upon his/her proficiency in the posted assignment. If a teacher decides to resign from the extra-curricular assignment, or the dual posting of the position is dissolved, the teacher holding such a dual posting shall be considered to be a displaced teacher. (See Letter of Intent—Page 103)

3. In the event a vacancy arises in the administrative or supervisory positions, any qualified teacher may apply. A letter will be sent to each applicant informing him/her of the decision made after it is confirmed by the Board. The Board will give all due consideration to qualified applicants from within the district.

E. Transfers

1. Initiated by the Teacher

   a. The teacher should notify his/her present principal or supervisor that a transfer is being initiated.

   b. A principal or supervisor may deny the transfer of the applicant to his/her building if the most recent professional evaluation is less than satisfactory. Such denial will be sent to the applicant in writing.

   c. Teachers shall be limited to the acceptance of one such transfer per school year.

2. Initiated by the Board

   The Board may choose to initiate involuntary transfers of teachers in order to achieve acceptable racial balance standards. When such action is undertaken by the Board it shall involve the least senior possible teachers from the buildings involved. In no case will such action be undertaken where the result would have the effect of causing the layoff of a teacher or teachers. Teacher(s) displaced by the Board under this procedure shall have the option (if possible) of simply trading positions or of exercising their rights as a displaced teacher under Article IX, Step 2 (*to the extent it would not cause further deviation from staff acceptable racial balance standards*). (Emphasis added).

ARTICLE IX

Reductions of Staff

Whenever reductions of staff (teachers) *either district-wide or within one or more buildings* (emphasis added), are undertaken by the Board, it shall be done in conformance with the following steps and principles:

Step 1—Identification of Displaced Teachers

A. The Board shall notify the principal of a building or supervisor of a grouping of teachers (TEAM leaders, art, music, physical education and various special education and vocational education subdivisions, etc.) that a reduction of teachers is to take place and of the number (and subject, grade level, or specialty type) of teaching positions to be reduced within that building or grouping.

B. The principal/supervisor shall then identify a number of teachers within that building/grouping equal to the reduction announced by the Board. Such identification shall be of the lowest seniority teacher within that building/grouping.

   It is understood that senior teachers may volunteer to be identified as a teacher without an assignment, and may by such act of volunteering become a displaced teacher. Only teachers who have been identified as displaced teachers shall have a right to make use of the "bump" procedures outlined in later steps of this procedure.

C. The principal/supervisor shall then determine whether or not the remaining teachers are certified and

qualified to staff the positions kept active within the building/grouping. It is recognized that such determination may involve the reassignment of teachers holding positions in the building/grouping; however, such reassignment shall honor, to the extent possible, the current assignments and aspirations of senior teachers within the building/grouping. (Within senior highs, care shall be taken to assure that North Central standards shall be observed in the assignment and/or reassignment of teachers. In middle school assignment/reassignment and qualification for same shall follow certification except for assignments in Foreign Language, vocal and instrumental music, library and vocational subjects (except for typing) which subjects shall depend upon identified majors and minors of academic study of the teacher and/or past successful teaching assignments within the last five (5) years.)

D. 1. A panel will be constituted, consisting of two teachers and two administrators who have a master's degree in reading or have demonstrated proficiency in the teaching of reading at the primary level. That panel will establish criteria for and develop an eligibility roster of qualified first and second grade teachers (one list) who will form the pool of eligible applicants for vacant 1st and 2nd grade district-wide posted vacancies in those grades. If, in the case of a specific posted vacancy, no person from the eligibility roster applies, other applicants will be considered in accordance with the PNA. This provision shall not operate to interfere with provisions of this Agreement relative to minority staffing goals.

2. The hereinbefore mentioned panel will be selected by the following process: JEA will name one teacher. The Board will name one administrator. JEA will provide the Board with a list of three (3) teachers from whom the Board will pick one (1). The Board will provide JEA with a list of three (3) administrators from whom JEA will pick one (1).

3. It is understood that the hereinbefore stated eligibility roster shall automatically include all teachers who are in place during the 1979-80 school year in a first or second grade assignment (including any split grade involving either first or second grade) together with all teachers who have successfully taught first or second grade on a regular or temporary assignment basis since January 1, 1976.

E. If it is not possible to staff the remaining positions within a building/grouping with the senior teachers remaining after Step 1, C, then and only then, may junior teachers identified in Step 1, B (above) be assigned/reassigned to teaching positions within the building. Use of such junior teachers shall be on a basis of seniority (the most senior receiving preference) and such assignment/reassignment of identified junior teachers shall be kept to the lowest number possible.

F. Teachers remaining without an assignment within a building/grouping when the provisions of Step 1 (A through D) have been completed shall be identified as displaced teachers.

Step 2—Bumping

Procedure for high seniority (upper 70%) teachers.

A. A displaced teacher whose seniority number is within the most senior 70% of teachers as found on the district's official seniority list shall have the right to assume the position of any teacher within the lower 30% of the seniority list provided that the displaced teacher is qualified according to standards outlined in Step 1, C above. It is understood that such replacement may require minor reassignment of teachers within the building.

B. If there is no position held by a teacher in the lower 30% of seniority which a displaced teacher desires, such displaced teacher shall replace the lowest seniority teacher beneath him/her assigned to a position in the area of the displaced teacher's last teaching assignment.

C. If neither Step 2, A or B results in the assignment of the displaced teacher, then the displaced teacher shall be offered the position of the lowest seniority teacher (provided such teacher is junior to the displaced teacher) who is teaching in a position for which the displaced teacher is certified and qualified (using the standards set forth in Step 1, C above).

Procedure for low seniority teacher (lower 30%)

A. A low seniority displaced teacher shall replace the lowest seniority teacher below him/her who is assigned to a position within the last teaching assignment of the displaced teacher.

B. If Step 2, A (above) does not result in the assignment of the displaced teacher to a position, the displaced teacher may replace the lowest seniority teacher below him/her who has an assignment for which the displaced teacher is certified and qualified using the standards set forth in Step 1, C above.

Step 3—Layoff

Any teacher who remains without an assignment after the procedure of Reduction of Staff (Step 1 and 2) are followed shall be identified as laid off and shall be duly notified of same by the Board.

Step 4—Recall From Layoff

A. As positions are reinstated or as they become vacant, teachers will be recalled to active employment with the Board in reverse order of layoff (the most senior laid off teacher being called back first), provided that such teacher is certified/qualified (as defined in Step 1, C above) for the vacant position.

B. If the specific assignment of a laid off teacher is reinstated and such teacher is the senior teacher on layoff status such teacher may be recalled by withdrawing the layoff notice. Such action shall make posting of the vacancy unnecessary.

C. *Recall from layoff shall be accomplished maintaining the minority ratio of teachers which existed prior to the layoff.* (Emphasis added.)

D. No laid off teacher will be required to accept recall during the school year if such laid off teacher is enrolled in school or is under contract to teach in an-

other school district. The Board may accept other legitimate reasons for not returning.

E. Teachers on layoff will lose their right to recall when their layoff time exceeds their seniority at the time of layoff or when they refuse callback (at a time other than during a school year or when they are under contract to another school district and when they cannot be released from such contract) whichever is the longer period of time.

* * *

R. *Course on Minority Groups*

1. Each new probationary teacher shall be required to participate in or successfully complete for credit an in-service course offered by the Jackson Public Schools in the area of cultural heritage and history of minority groups in America. The course shall give special attention to the Black, Spanish-speaking and Indian American. Included in the course shall be a review of current instructional practices and curriculum.

2. This course shall be offered by the Jackson Public Schools at least once during the regular school year and shall be designed in such a way that one (1) semester hours of salary schedule credit, if desired, will be received by participants.

3. Teachers shall have the opportunity of taking the in-service course at no cost to themselves. The Board assumes no responsibility for payment of tuition or travel costs for teachers taking university or college credit courses.

4. Tenure teachers shall also be encouraged to take a course of study on minority groups.

5. The in-service course will be evaluated and this evaluation will be reported to the Professional Council.

6. The course shall consist of no more than five (5) sessions.

S. The curriculum used in the school district shall reflect the multi-ethnic nature of our society. The curriculum shall reflect the contribution and achievements of minority groups in art, science, history, literature, and all life and cultures should be apparent in the design of materials.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 4-72340

THE JACKSON EDUCATION ASSOCIATION, INC., a non-profit Michigan corporation, LINDA BENSON, and VIRGINIA DAVIS,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE JACKSON PUBLIC SCHOOLS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Jackson Education Association, Inc. (Association), plaintiff herein, filed this suit on August 30, 1974 for itself and on behalf of Linda Benson and Virginia Davis, two black school teachers employed by defendant, the Board of Education of the Jackson Public Schools (Board). The Association is a labor organization with the meaning of Michigan's Public Employment Relations Act, M.C.L.A. §423.201, *et seq.*, and is the exclusive bargaining agent, *see* M.C.L.A. §423.211, for the teachers employed by the Board. The first count in the complaint filed by the Association alleges that, on September 7, 1973, the Association and the Board entered into a collective bargaining agreement effective as of September 1, 1973; that the employment practices of the Board, prior to the execution of the collective bargaining agreement, had, *inter alia*, the effect of discriminating against the employ-

ment of minority groups; and that, as a consequence of the alleged discriminatory employment practices, the parties agreed to include the following provision in the collective bargaining agreement:

> The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are black, American Indian, Oriental, or of Spanish descendency. The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools. (Article VII, ¶E.)

Count I also alleges that the parties agreed to the following provision as part of the proper layoff procedure:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance. (Article XII, ¶B, subparagraph 1.)

Count I further alleges that, on or about April 8, 1974, the Board took formal action to lay off seventy-five teachers (pursuant to its estimate that that many teaching positions had to be eliminated), including plaintiffs Davis

and Benson; that nineteen of the seventy-five teachers originally laid off were "minority group personnel" within the meaning of the collective bargaining agreement; that the Board failed to maintain the proper percentage of minority group personnel (the proper percentage, pursuant to Article XII, paragraph E, was 9.4% the "percentage of minority group personnel employed at the time of the layoff'') because of its decision to retain eleven non-minority teachers that had achieved tenure status under the Michigan Teacher Tenure Act, M.C.L.A. sec. 38.71, et seq. (the Act), and to layoff eleven minority group teachers that had not yet achieved tenure under the Act (these eleven were on probationary status).

The second count of the complaint alleges only that the Board, in laying off plaintiffs Davis and Benson, violated Article X paragraph B of the collective bargaining agreement, and that as a direct result of this breach, plaintiffs suffered damages, including the loss of pay. Plaintiffs' prayer for relief seeks only that the court find that the Board breached Article XII, paragraph B of the collective bargaining agreement by failing to maintain the proper percentage of minority group personnel because of the layoff of plaintiffs Benson and Davis; that the court declare Article XII, paragraph B of the collective bargaining agreement to be not contrary to the provisions of the Teacher Tenure Act; that the court enjoin the Board from further violating the provisions of Article XII, paragraph B, *i.e.*, that the court restrain the Board from laying off a greater percentage of minority group personnel than the percentage of minority group personnel employed at the time of any future layoff and that plaintiffs Davis and Benson[1] be awarded damages (for expenses incurred as a result of defendant's alleged breach of contract), back pay, reinstatement to their jobs, and "such other relief as may be just and equitable in the eyes of this Court."[2]

The Board admits all of the averments in the complaint except the allegation that, prior to the making of the collective bargaining agreement in September 1973, it had engaged in employment practices discriminatory to minority groups, and that such alleged discriminatory employment practices caused the alleged relative underemployment of minority group personnel. Defendant asserts, moreover, that its actions in laying off a greater percentage of minority group personnel than the total percentage of minority group personnel employed at the time of the layoff were compelled by the provisions of the Teacher Tenure Act, so that it could not adhere to the contract language which it views as contrary to, and subordinate to, the laws of the State of Michigan.

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[1] All of the minority group personnel originally laid off in 1974 have been recalled with the exception of plaintiff Benson, who remains on the Systems Layoff Recall List although she has found alternative employment for the 1974-76 school years. Defendant contends that plaintiff Benson resigned her position to obtain full-time employment elsewhere and that plaintiff Davis taught in a program that had been abolished.

[2] The collective bargaining agreement under which this dispute arose was replaced by a successar agreement on September 1, 1975. The same language relating to layoff procedures was retained in the successor agreement. See Exhibit 13, Article XII, paragraph B, and affirmative action language was added to the existing contract. In the Spring of 1975, the Board laid off eighteen teachers but, in doing so, the language of the contract was followed.

The trial of this cause was ordered bifurcated, and on March 31, 1976, the court held a bench trial on the liability issue. Just prior to trial, plaintiff filed an amendment to paragraph A of Count I of the complaint.[3] At trial, plaintiffs offered the testimony of the Executive Director of the Association and fifteen exhibits were admitted into evidence together with certain deposition testimony. At the conclusion of the trial, the cause was taken under advisement for preparation of the court's findings of fact and conclusions of law. When the court examined the evidence, it questioned its jurisdiction over this cause on its own motion.[4] The parties were requested to submit briefs on that issue and they did so; after much consideration the court has concluded that it lacks jurisdiction over the subject matter of this action.[5]

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[3] Although the proposed amendment was filed on the first day of trial without leave of the court, we treat it as properly filed. The amendment seeks to include an allegation that the court properly has jurisdiction over the action pursuant to Title VII. As amended, paragraph of Count I reads:

> A. This Court has original jurisdiction of the action here brought under the provisions of the United States Code, Title 28, 1343(3) and 1343(4) and under United States Code, Title 28, 1331, based upon violations of rights secured by and arising out of statutes (e.g., United States Code, Title 42, Section 2000d and 2000e-2(a) (1) and (2)) and the Constitution of the United States. The amount in controversy exceeds the sum or value of ten thousand ($10,000.00) dollars, exclusive of interest and costs.

[4] The Board did not raise the jurisdictional issue prior to or during the trial. It addressed itself to the jurisdictional issue only after the court raised it *sua sponte*.

[5] Plaintiffs once again have sought to amend their complaint in an attempt to confer jurisdiction upon the court. To their brief on the jurisdictional issue, plaintiffs attached a motion for leave to amend their complaint to allege a violation of 42 U.S.C. § 1981.

In support of their allegations that defendant engaged in employment practices, prior to the making of the 1972 collective bargaining contract, that resulted in hiring policies discriminatory to minority personnel, *see* Complaint, Count I, paragraph F, plaintiff submitted Exhibits 14 and 15. Exhibit 14, supplied by the Board, merely sets forth the student racial mix and the number of minority teachers contained in the total teaching faculty.[6] The evidence further demonstrated that the first black teacher in the City of Jackson was not hired until 1953. Following the 1968-69 academic year, the Board attempted to increase the percentage of minority teachers, causing the minority staff ratio to increase from 3.9% to 8.8% over the next three years. The Board did not begin to maintain student minority ratio statistics until the 1968-69 academic year. In 1972, Dr. Lawrence Read, then the superintendent of schools, reported the recommendations of the desegregation sub-committee to the members of the Board. One of these recommendations suggested that:

> . . . the Board of Education direct the school administration to work towards a teaching staff, in the elementary schools, that also achieves a racial balance as close as possible to that of the students with a mininmum of two black teachers in every school.

It is interesting to note that the evidence also demonstrated that there were not enough black teachers in the school system at that time to implement this recommendation.

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[6] Exhibit 15 represents an extension of the data contained in Exhibit 14. For example, Exhibit 14 sets forth the percentage of minority students contained in the total student enrollment together with the percentage of minority teachers employed by the Board.

Plaintiffs argue that the statistical data submitted in exhibit form sufficiently establish that the Board engaged in discriminatory hiring practices;[7] that these allegations of racial discrimination in violation of the fourteenth amendment are sufficient to confer jurisdiction over this cause upon the court; that, once having established that this court has jurisdiction pursuant to the fourteenth amendment, the court has pendent jurisdiction to resolve their claims that the Board breached the collective bargaining agreement, the sole claims set forth by the complaint. The difficulty with plaintiffs' argument is that it assumes that the *de facto* imbalance disclosed by the statistical data in and of itself demonstrates a violation of the fourteenth amendment's equal protection clause. This simply is not so. *Washington v. Davis,* 44 U.S.L.W. 4789 (U.S. June 7, 1976). It is true, however, that statistical evidence may demonstrate that hiring and promotion practices of an employer have a racially differential impact sufficient to make out a *prima facie* case under Title VII. *See, e.g., Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971); *Robinson v. City of Dallas,* 514 F.2d 1271, 1272-73 (5th Cir. 1975).[8] The plaintiffs, however, have

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[7] Plaintiffs admit that when Dr. Lawrence Read became superintendent, the Board began a real effort to end the racial imbalance in the student enrollment at each school and in the teaching staff. Plaintiffs argue, however, that, notwithstanding the valiant efforts of Dr. Read the racial imbalance situation has not been rectified.

[8] This is not to say, however, that statistical evidence tending to demonstrate a racially differential impact cannot be utilized in a non-Title VII racial discrimination case. In *Washington v. Davis, supra,* the Court, in speaking of such cases, stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 44 U.S.L.W. at 4793.

not demonstrated that they fufilled the jurisdictional prerequisites for a Title VII suit—they did not allege or demonstrate that discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC), that they received a right-to-sue letter from EEOC, or that they timely acted upon a right-to-sue letter. 42 U.S.C. §2000e-5. *See, e.g., Alexander v. Gardner-Denver Corp.,* 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798 (1973).

The proofs presented at trial were not directed at establishing violations of the fourteenth amendment, Title VII, or any other statute forbidding racial discrimination. Nor did plaintiffs ever make averments sufficient to establish such violations. The complaint, as well as the proofs offered at trial, demonstrated that this dispute centers about a conflict between the provisions of the collective bargaining agreement and state law as interpreted by defendant. Plaintiffs' contractual claim arises under state law and the parties have not shown, nor could they, that the court has jurisdiction over it. The parties are not of diverse citizenship and the contractual claim can in no way be considered pendent to any federal claim since it does not arise out of a common nucleus of operative fact. Any federal claim advanced by plaintiffs was advanced to set forth a pretextual jurisdictional basis so that the court could decide the real dispute between the parties—the contractual claim. The contract dispute is, however, a state law matter and the state courts are fully able to resolve any real or apparent conflict between the Michigan Teacher Tenure Act and the collective bargaining agreement's provisions. The court does not have jurisdiction over plaintiffs' asserted Title VII claim because of plain-

tiffs' total failure to comply with the jurisdictional prerequisites to a Title VII action. The complaint was amended to allege 42 U.S.C. §2000d as a jurisdictional basis, but plaintiffs made no attempt to include averments in their complaint or to introduce any evidence at trial to support such a claim.[9]

Accordingly, we conclude that the jurisdictional averments contained in the complaint are insufficient to vest this court with jurisdiction over the Title VII cause of action asserted by plaintiff and that the non-Title VII causes of action, advanced by amendments to the complaint, are unsupported by the evidence.

/s/ Robert E. DeMascio
United States District Judge

Dated: December 15, 1976

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[9] 42 U.S.C. § 2000d, *et seq.*, prohibits discrimination on the basis of race, color or national origin against any person or by anyone in a program or activity receiving federal financial assistance. Here, however, plaintiffs' claim of discrimination revolves about the contractual dispute and there has been no showing whatsoever that defendant's allegedly discriminatory actions were motivated by a racial animus.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 4-72340

THE JACKSON EDUCATION ASSOCIATION, INC., a non-profit Michigan corporation, LINDA BENSON and VIRGINIA DAVIS,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE JACKSON PUBLIC SCHOOLS,

Defendant.

JUDGMENT

This matter having come before the court for trial, and the court having filed its Findings of Fact and Conclusions of law.

IT IS ORDERED AND ADJUDGED

that the plaintiffs take nothing from their complaint and that the action is dismissed with prejudice and without costs.

Dated at Detroit, Michigan, this 15th day of December 1976.

/s/ Robert E. DeMascio
United States District Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF JACKSON

FILE NO.: 77-011484CZ

JACKSON EDUCATION ASSOCIATION, INC., a non-profit Michigan corporation, VIRGINIA DAVIS and LINDA BENSON STOKES,

Plaintiffs,

-v-

BOARD OF EDUCATION OF THE JACKSON PUBLIC SCHOOLS,

Defendant.

OPINION

(Sept. 6, 1979)

This litigation began on August 30, 1974, when plaintiffs filed a complaint in the U. S. District Court for the Eastern District of Michigan. On January 12, 1977, Judge Robert DeMascio issued an order stating:

> "Moreover, the court declined to entertain plaintiff's state contract claim, plaintiff is, therefore, free to pursue his state remedies."

On February 1, 1977, the plaintiffs filed a claim of appeal in the 6th Circuit Court of Appeals. This appeal was dismissed by stipulation on May 25, 1977.

The plaintiffs filed a complaint in the Jackson County Circuit Court on January 25, 1977, alleging breach of contract. The defendant filed a motion for summary judgment and accelerated judgment on March 8, 1977 and in an order dated June 13, 1977, the Honorable Charles Fal-

ahee rendered an opinion granting the motion for accelerated judgment without prejudice since the action in the federal courts was pending at the date of the filing of the complaint. This action was then filed in June of 1977.

The pleadings and exhibits in the federal court were submitted to this court for its consideration by stipulation of the parties along with agreed statements of fact and the court makes its findings of fact as follows:

In November of 1971, one of the defendant's administrators recommended to the members of the racial subcommittee of the school's advisory council that there be increased recruitment of minority teachers plus increased protection of minority teachers from lay-offs. At that time 15.9% of the students were classified as members of minorities whereas, 8.8% of the faculty were minority members. This had increased to that figure in one year from a percentage of 5, after an intensified affirmative action hiring policy by the school district.

The successful recruitment of minority teachers continued to be a burden, however, due to economic circumstances and decreasing student enrollment. The straight seniority system mandated by the then existing collective bargaining agreement imposed the primary burden of lay-offs on the "last hired." The "last hired" were the very minority teachers the system was trying to recruit and retain. The affirmative action program was impeded by the effects of the seniority system. The school superintendent stated in his deposition at page 24:

> "When you went into the meeting place with a pink slipping, you saw a lot of black faces there. As a matter of fact, it did literally wipe-out all of the gain

that has been made in terms of affirmative action to bring that about."

In February, 1972, the school district, according to Superintendent Reed, "experienced a violent explosion at Jackson High School, probably the worst we had had," which included fighting and rioting among the students because of racial conflicts.

In order to achieve the end of a truly integrated school system, representatives of the board and of the Teacher's Education Association reached an agreement effective July 1, 1972, which insured increased minority hiring and increased protection from lay-offs for the newly hired teachers.

Article VII, Paragraph E of the Collective Bargaining Agreement set forth the mutual goal of the parties:

> *"The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental or of Spanish descendancy. The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools."*

To carry out the announced goal of the parties, the Board and the Association provided at Article XII, Paragraph B, Subparagraph 1 as follows:

> *"In the event that it becomes necessary to reduce the number of teachers through layoffs from employment by the board, teachers with the most seniority in the district shall be retained, except that at no*

> *time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the lay-off."*

In the spring of 1973, lay-offs were necessary and the contract language was followed. The same affirmative action and lay-off language was continued in the successor agreement in 1973.

In April of 1974, the school district announced the impending lay-off of 75 teachers, 19 of whom were minority personnel. The ratio of minority personnel on the staff at said time was 11.1%. Ignoring the contract language and the ratio figure, the board chose to retain all tenure teachers and failed to maintain the percentage of minority personnel which existed at the time of the lay-off.

Plaintiffs pray for a declaratory judgment that the defendant has breached the collective bargaining agreement by laying off the plaintiff individuals and any other minority personnel then similarly situated and further that the court order the reinstatement of the plaintiffs and award them compensatory damages. The defendant moves for a summary judgment pursuant to GCR 1963, 117.2(1).

It has not been established that the board had discriminated against minorities in its hiring practices. The minority representation on the faculty was the result of societal racial discrimination.

It is the defendant's position that the lay-offs were proper because if the plaintiff probationary teachers were retained to maintain the racial balance required by the collective bargaining agreement, the defendant would have had to lay-off tenured personnel in their stead in

violation of the Teacher Tenure Act. (MCLA 38.105; MSA 15.2005).

The Teacher Tenure Act insofar as relative provides:

MCLA 38.101, Article 4, Section 1:

> *"Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof as are hereafter provided."*

MCLA 38.105, Article 4, Section 5:

> *"Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified."*

MCLA 38.1072, Article 10, Section 2:

> *"No teacher may waive any rights and privileges under this act in any contract or agreement made with the controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and the controlling board make continuance of employment of such teacher continued upon certain conditions which may be interpreted as contrary to the reasonable and just causes of dismissals, provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to the termination of employment of such teacher."*

The plaintiffs contend there is no conflict between the Tenure Act and the collective bargaining agreement because the agreement speaks of "lay-offs" and not "terminations" as used in the Tenure Act. Websters Third New International Dictionary (1966) page 1281 defines "lay-off" as follows:

> "To cease to employ a worker, usually temporarily, because of slack in production and without prejudice to the worker-usually distinguished from *fire.*"

"Termination" is defined at 2359 of this volume as follows:

> "To end formally and definitely (his employment with the company was terminated.) To discontinue the employment of: discharge."

Judge Learned Hand in an analogous situation involving veterans preferences, ruled as follows: "Discharge" as used in statute declaring that veteran shall not be discharged from position to which he has been restored within one year after restoration, means a permanent end to relation of "lay-off", which contemplates a period during which a worker is temporarily dismissed or allowed to leave his work or that part of the year during which activity is partially or completely suspended. *Fishgold v Sullivan Dry Dock and Repair Corp,* 154 F 2d 785 at 788 (1946).

The defendant argues that unless the Tenure Act also covers lay-offs, the spirit and purpose of the Teacher Tenure Act would be violated.

However, in interpreting the Teacher Tenure Act, the Michigan Court of Appeals stated in *Goodwin v Kalamazoo Board of Education,* 82 Mich App 559, 267 NW2d 142 (1978), that "only when a statute is ambiguous is a court forced to examine legislative intent." If the Legislature in enacting the Tenure Act had intended to include lay-offs, it would have been a simple matter to include such wording. "The Legislature has seen fit to include no such condition and the court is without any power to write it in under the guides of judicial construction."

Ford Motor Company v Unemployment Compensation Commission, 316 Mich 776 (1947).

It has further been ruled in the federal courts that "to declare provisions of a collective bargaining agreement void it must be on the basis of clear and distinct legal principles." *Jersey Central Power & Light Company v. Local Union,* 508 F 2d 687, page 704 (1975). In interpreting the Tenure Act in Michigan, the Appellate Court ruled in *Bruisma v Wyoming Public Schools,* 38 Mich App 745, 749 (1972), that "Article 4, Section 5 of the Act does not excuse a district from honoring a valid contract."

In *Rehburg v Ecorse School District No. 11,* 330 Mich 541, 545 (1951), the court discussed the primary purpose of the Tenure Act.

> "To maintain an adequate and competent teaching staff, free from political and personal arbitrary interference.
>
> "It promotes good order and the welfare of the state and of the school system by preventing removal of capable and experienced teachers at the personal whims of changing office holders."

Plaintiffs rely on that portion of *Franks v Bowman Transportation,* 424 US 747, 778-79; 96 SCt 1251; 47 LEd 2d 444 (1976) which states:

> "The court has also held that a collective bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Company v Huffman,* 345 US 330; 97 LEd 1048; 78 SCt 681 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority' is certainly no less than in other areas of public policy interests. (Citations omitted.)"

Both parties agreed to the concept of increased minority hiring and retention of minority teaching personnel in an integrated school system. The lay-off plain promoted "good order and the welfare of the state and of the school system" and was entirely consistant with the announced goals of the Tenure Act.

The court finds that there is no conflict between the Michigan Teacher Tenure Act and the collective bargaining agreement entered into by the parties to this suit. Defendant's motion for summary judgment based upon such a conflict is denied.

The Board further argues that the contract provisions for affirmative action violates the Civil Rights Act of 1964 and the Michigan Civil Rights Act of 1977 in that it sets up a racial quota or racial goal and such are necessarily discriminatory.

Racial quotas are no *per se* violative of the Constitution where they are used as remedial measures to assure the disestablishment of state-established discriminatory school systems. The US Supreme Court in *US v Montgomery Board of Education,* 395 US 225, 232 Ed 2d 263, 89 SCt 1670 (1969), approved a district judge's order providing for a scheduled desegregation of faculty and staff on a ratio basis after the school board had failed to make adequate progress toward faculty desegregation.

On March 24, 1972, Title VII of the Civil Rights Act of 1964 was amended to make illegal racial discrimination by public employers.

However, under Section 706(g) of Title VII, Congress provided for such "affirmative action as may be appropriate" in the law concerning the propriety of racial goals thereunder, as was stated in *EEOC v Local*, 638, 532 Fd 2d 821 (2d Circuit 1976), page 828.

> "The imposition of racial goals is to be tolerated only when past discrimination has been clear-cut and the effects of 'reverse discrimination' will be diffused among an unidentifiable group of unknown, potential applicants rather than upon an ascertainable group of easily identifiable persons."

To like effect are *Detroit Police Officers Assn v Young*, 446 F Supp 979 (1978); *Kirkland v New York State Department of Corrections*, 520 F 2d 420 (2d Circuit 1975); *Bridgeport Guardians v Civil Service Com'n*, 482 F 2d 1333 (2d Circuit 1973).

The common thread running through each of these cases was the precept that no employer could be trusted to form a fair program for increasing minority participation; affirmative action plans must be imposed by the courts. These cases did not discuss programs where all the parties agreed to a plan to increase minority representation.

Article 12, Paragraph B of this instant contract is a racial quota. It is a quota which effects an ascertainable group of easily identifiable persons. The white tenure teachers who would be laid-off pursuant to said quota are an easily identifiable group for whom the hardship of reverse discrimination would be direct, obvious and personal. There is no history of overt past discrimination by the parties to this contract.

In the US Supreme Court decision in *Teamsters v United States*, 45 Law Week 4506 (1977), the Court held that a facially neutral seniority plan, operating on the concept of a "last-hired, first fired" is not discriminatory against minority personnel even though they are disportionally effected.

In the instant case the parties agreed to an affirmative action plan which would, in the event of lay-offs, disproportionately discriminate against some white tenure teachers who had more seniority than those minority teachers to be retained under the percentage quota of proportionate lay-offs based upon racial make-up of the teachers and minority students.

Here the parties impliedly agreed that there had been societal discrimination against minorities in securing an education and employment as teachers and determined to do something to remedy the situation. That something was the execution of the affirmative action provisions of their collective bargaining agreement.

The affirmative action provisions were kept in when the contracts were renewed. Progress in increased minority faculty was made and eventually when the minorities were in relative proportion to the number of minority students, then such provisions could be removed from the contract.

The Supreme Court's decision in *University of California Regents v. Baake*, 46 LW 4896 (1978), is of little help since it only decided that under the factual situation

presented, race may be considered as a factor in college admissions but racial quotas are inherently suspect and must be justified by the state to show they are constitutionally permissible and their use is necessary to the accomplishment of a substantial state interest.

On June 27, 1979, the US Supreme Court ruled in *United Steel Workers of America v Weber et al*, 47 US LW 4851 that it was a permissible affirmative action plan where there was a master collective bargaining agreement covering terms and conditions of employment at 15 Kaiser plants which included affirmative action plans to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white staff work forces by reserving for black employees 50% of the openings in in-plant craft training programs until the percentage of black workers in a plant was commensurate with the percentage of blacks in the local labor force.

Weber, a white production worker, brought the action alleging that junior black employees were receiving training in preference to more senior white employees who were thus discriminated against in violation of Title VII of the Civil Rights Act of 1964.

The Court reasoned that if Congress had meant to prohibit all racial conscious affirmative actions, it could have provided that Title VII would not require or *permit* racially preferential integration efforts.

The Court stated that it did not believe that it was necessary to define the line of demarcation between permissible and impermissible affirmative action plans in deciding the Kaiser-USWA plan was permissible. It merely cited the purposes of the plan mirrored those of

the statute in breaking down old patterns of racial segregation and hierachy; opening employment opportunities in occupations traditionally closed; it did not unnecessarily trammel the interests of whites since ½ of the trainees would be white and the plan was a temporary measure not intended to maintain racial balance but simply to eliminate a manifest racial inbalance.

In the instant case, the Board and the Union tried to be a part of the solution to societal discrimination when they executed the affirmative action contract. They had no intention of creating a problem of discrimination. Then the court rulings came out which could be construed to say that the Board was unlawfully discriminating against white teachers under the provisions of Title VII of the Civil Rights Act of 1964.

As stated in *Weber, supra,*

> "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long.' 110 Cong. Rec., at 6552 (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary private, race-conscious efforts to abolish traditional patterns of racial segregation and hierachy."

Refusal to rule such programs constitutional would have the effect of delaying even the most elementary equality in the work place for another twenty years. Vernon E. Jordan Jr., *To Be Equal, The Blazer* (July 24, 1978).

Senator Humphrey said in his discussion of the legislation, 110 Cong. Rec., at 6547, "How can a Negro child be motivated to take full advantage of integrated educa-

tional facilities if he has no hope of getting a job where he can use that education?''

To which we add, how can a minority child aspire to a teaching career or other career requiring an advanced education if a disproportionately small number of such minority teachers are represented in the school system?

The effects of such daily observed societal discrimination discourage his ambition; the effects of such daily observed societal discrimination feed and encourage racial hatred and distrust of "whitey"; the effects of such daily observed societal discrimination create excuses for the non-achiever, or the indolent, minority student.

Voluntary affirmative action plans are to be encouraged since the very foundation of this country can be secure only if the citizens work out most of their problems voluntarily and without the intrusion of "Big-Brother Courts" to monitor and direct every facet and phase of their relationships.

To hold that affirmative action plans are invalid unless promulgated by a court after a finding of past discrimination as the pre-*Weber* cases held, is to say that all employers, all employees, and all unions, are irresponsible and not to be trusted with the conduct of their own daily affairs, i.e., democracy is a failure and only the bureaucrats, (here the courts) are to be trusted with such matters. Happily, the life depicted in Orwell's *1984* is still not our way of life.

Weber, *supra*, is controlling. The fact that the Board is not a private employer does not excuse its liability and duties under the subject contract. Governmental agencies

get their authority form (sic) all the people and must, therefore, conduct themselves in such fashion as to give the greatest benefit to the public weal.

This court finds that the instant collective bargaining plan is a permissible affirmative action plan violative of no law. A declaratory judgment shall enter finding that the individual plaintiffs were laid-off in violation of Paragraph 3 of Article XVII of the collective bargaining agreement between the Jackson Public Schools and the Jackson Education Association, Inc., and are entitled to such relief and damages as the court shall determine in further hearings. The motions for summary judgments are denied.

Counsel for plaintiffs shall prepare a declaratory judgment in conformity with this opinion. No costs are to be taxed in that a public question is involved and there is nothing to indicate that the Board did not act under color of law as it appeared to them at the time of the lay-offs.

/s/ Gordon W. Britten P11216
Circuit Court Judge

DATED: August 31, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Civil Action File No. 81-60156

WENDY WYGANT, et al.,

Plaintiffs,

vs.

JACKSON BOARD OF EDUCATION, et al.,

Defendants.

AFFIDAVIT RE MINORITY
TEACHERS WITH SENIORITY

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

Susan Diebold, being first duly sworn, deposes and says that:

1. Affiant is a plaintiff and a teacher in the Jackson Board of Education school system.

2. Attached is a true and exact copy of seniority list of the Jackson School System.

3. Said list shows:

a. The percentage of minority teachers in 1972 was 8.3%.

b. The percentage of minority teachers in 1976 was 10.2%.

c. The percentage of minority teachers in 1981 was 12%.

4. Therefore, according to the defendant Board's said seniority list, there have been new hires, since the 1972 affirmative action clause was instituted.

5. Further, said list ("m" indicating minority), clearly shows that more than the "4 or 5" minority teachers would have been left in 1976, if ordinary seniority had been used, contrary to defendants' argument and claim.

6. It can be seen that there were many high-seniority minority persons at all times herein relevant.

7. Since 1972, 126 new teachers have been hired, of which 25% were minorities.

8. In 1978, the defendant School Board sent out recruiters to the South and elsewhere, seeking minority teachers to hire, upon information and belief.

Further, deponent says not.

/s/ Susan Diebold
Affiant

Thomas Rasmusson (P19242)
Attorney at Law
501 S. Capitol Avenue
Suite 305
Lansing, MI 48933

STATE OF MICHIGAN)
) ss.
COUNTY OF JACKSON)

On this 24th day of February, 1982, personally appeared before me, a Notary Public, in and for said county and state, the above-named, Susan Diebold, who acknowledged that she has read the foregoing by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge except those matters therein stated on information and belief, and as to those matters she believes them to be true.

/s/ Linda R. Thayer

Notary Public, Jackson Cty, MI

My Commission Expires: May 30, 1983

JACKSON PUBLIC SCHOOLS

March 1, 1981

TEACHER SENIORITY LIST

40-04-10-00	Beach, Dorothy	Elem. Perm.	K-8 All Subjects
44-09-01-00	Sarata, Stella	Elem. Perm.	K-8 All Subjects
45-04-10-00	Hamilton, Eva	Elem. Perm.	K-8 All Subjects; 9-12 Violin
47-09-01-00	Devor, Delphine	Elem. Perm.	K-8 All Subjects
49-05-03-00	Rohde, Catherine	Elem. Perm.	K-8 All Subjects
50-04-13-00	Miller, Gertrude	Elem. Perm.	K-8 All Subjects
50-09-01-00	Owens, Clarence	Sec. Perm.	7-8 All Subjects; 9-12 Natural Science, Geography, History
51-08-07-00	Mesko, George	Sec. Perm.	7-8 All Subjects; 9-12 Math, Economics, Gen. Business
51-08-17-00	Goolian, Zabelle	Sec. Perm.	7-8 All Subjects; 9-12 French, Soc. Sci., English, K-12 Guid. Counselor
51-09-01-00	Hartsuff, Maurice	Sec. Cont.	7-8 All Subjects; 9-12 History, Soc. Sci., Agric. Educ.; K-12 Guidance Counselor
51-09-01-00	Ericksen, Robert	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Arts, Soc. Sci., Machine Shop
51-09-01-00	Richter, Richard	Sec. Perm.	7-8 All Subjects; 9-12 Speech, Soc. Sci., Biology, Science; K-12 Physical Education

52-04-06-00	Meyer, Dorothy	Elem. Perm.	K-8 All Subjects
52-04-15-00	Kalmbach, Phyllis	Elem. Perm.	K-8 All Subjects
52-09-02-00	Bender, George	Sec. Perm.	7-8 All Subjects; 9-12 Science, Biology, Soc. Sci.; K-12 Phys. Education
52-09-02-00	Furnas, Herbert	Sec. Perm.	7-8 All Subjects; 9-12 Math, Poli. Sci., English, History; K-12 Guidance Counselor
53-04-26-00	*retired 7/81* Hunt, Phillip	Sec. Perm.	7-8 All Subjects; 9-12 Commerce, Bus. Admin., Phys. Ed.
53-06-06-00	Buekers, John	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Arts, Agric. Educ., Engineering Drawing
53-06-30-00	*retired 6/81* Tramp, George	Sec. Perm.	7-8 All Subjects; 9-12 History, Geography, Geology
53-09-08-00	Fowler, Phillip	Sec. Perm.	7-8 All Subjects; 9-12 Biology, Soc. Sci., English, Speech
54-04-20-00	Morris, Ruth	Elem. Perm.	K-8 All Subjects
54-04-26-00	Bridges, William	Sec. Perm.	7-8 All Subjects; 9-12 History, Geography, K-12 Ind. Arts, Guidance Counselor

54-04-28-00	Inman, Mary Ann	Sec. Perm.	7-8 All Subjects; 9-12 English, French, Latin; K-12 Homebound, Guidance Counselor
54-05-24-00	Persing, Margaret	Elem. Perm.	K-8 All Subjects; 9-12 Blind Ed.
54-06-14-00	Pawlak, Anthony	Elem. Perm.	K-8 All Subjects
54-11-05-00	Denby, Marian	Elem. Perm.	K-8 All Subjects
55-02-24-00	Oren, Conway	Sec. Perm.	7-8 All Subjects; 9-12 Gen. Science, Agr. Farm Seop.; Voc. Trade & Industrial
55-03-14-00	Hawkins, Eldon	Elem. Perm.	K-8 All Subjects
55-04-21-00	Murphy, Kevin	Sec. Perm.	7-8 All Subjects; 9-12 English, Science, Soc. Sci.
55-04-31-00	Dailey, Katheryne	Sec. Perm.	7-8 All Subjects; 9-12 Art, History, Drawing & Design; K-12 Teacher of the Blind
55-05-13-00	Klitzing, Jane	Sec. Perm.	7-8 All Subjects; 9-12 Biology, Recreation; K-12 Health and Physical Education
55-06-25-00	Grogan, Clara	Sec. Perm.	7-8 All Subjects; 9-12 Math, Span., French; K-12 Lib. Sci.

55-08-19-00	Goudreau, Helmi *retired 6/81*	Elem. Perm.	K-8 All Subjects
55-09-12-00	Patterson, Russell *retired*	Sec. Perm.	7-8 All Subjects; 9-12 Trade & Ind., Ind. Arts, Soc. Sci., Psychology, Speech
56-04-11-00	Lasowski, Edward	Sec. Perm.	7-8 All Subjects; 9-12 English, Nat. Sci.; K-12 Phys. Ed.
56-04-11-00	Stinnett, Jeffery	Elem. Perm.	K-8 All Subjects
56-04-26-00	Espie, William	Elem. Perm.	K-8 All Subjects
56-05-19-00	Fedore, William	Sec. Perm.	7-8 All Subjects; 9-12 Zoology, Soc. Sci., Phys. Sci.
56-05-22-00	Hammersley, John	Sec. Perm.	7-8 All Subjects; 9-12 Social Science, Commerce
56-06-04-00	Prahl, Edward	Sec. Perm.	7-8 All Subjects; 9-12 English, Ind. Arts, Soc. Sci., Science
56-06-19-00	Jenkins, Lucille	Elem. Perm.	K-8 All Subjects
56-07-05-00	Tibbitts, Warren	Sec. Perm.	7-8 All Subjects; K-12 Phys. Educ.; 9-12 Soc. Sci., History, K-12 Health
56-07-17-00	West, A. Vance	Sec. Perm.	7-8 All Subjects; K-12 Art; 9-12 Soc. Sci., English

56-08-16-00	Grogan, Max	Sec. Perm.	7-8 All Subjects; 9-12 Drawing & Design, English & Speech; K-12 Art
56-09-31-00	Jansen, Patricia	Elem. Perm.	K-8 All Subjects
57-03-15-00	Ekster, Madge	Elem. Perm.	K-8 All Subjects
57-03-18-00	Hartzler, Genevieve	Sec. Perm.	7-8 All Subjects; 9-12 Hygiene, Physiology, Chem.; K-12 P.E.
57-03-25-00	Woodring, Mary Lou	Elem. Perm.	K-8 All Subjects
57-04-23-00	Raczkowski, Walter	Elem. Perm. Sec. Perm.	K-8 All Subjects; 9-12 Soc. Sci., Phys. Educ.
57-05-07-00	Linquest, Genevieve	Elem. Prem.	K-8 All Subjects
57-05-24-00	Whitson, Alexander	Sec. Perm. Elem. Cont. Voc. Cert.	K-8 All Subjects; 9-12 English Voc. Tech.; K-12 Art; 9-12 Voc. Educ. Drafting
57-06-03-00	Hill, Richard	Sec. Perm.	7-8 All Subjects; 9-12 Math, Science
57-07-01-00	Parsons, Warren	Sec. Perm.	7-8 All Subjects; 9-12 Agric., Farm Shop, Gen. Sci., Soc. Sci., Voc. Agric., Farm Shop
57-07-25-00	Johnson, Richard	Sec. Perm.	7-8 All Subjects; 9-12 English, Soc. Sci.; K-12 Health & P.E.
57-07-23-00	Dunlap, Marie	Elem. Perm.	K-8 All Subjects

57-08-23-00	Snyder, Faye	Elem. Perm.	K-8 All Subjects
57-09-09-00	(M)Swint, Pearl	Elem. Perm.	K-8 All Subjects; K-12 Guid. Counselor
57-11-25-00	Carlson, Joan	Elem. Perm.	K-8 All Subjects
58-01-17-00	Acker, Gaylord	Elem. Perm.	K-8 All Subjects; K-12 Guid. Counselor
58-01-24-00	**Macfarlane, Charles**	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Arts, Drawing & Design
58-03-05-00	Winters, Constance	Elem. Perm.	K-8 All Subjects
58-04-24-00	Stellingworth, Jean	Elem. Perm.	K-8 All Subjects
58-04-25-00	Whittaker, Rachael	Elem. Perm.	K-8 All Subjects; K-12 Guid. Counselor; School Soc. Wkr.
	retired 6/81		
58-05-01-00	Boyle, Ruth	Sec. Perm.	7-8 All Subjects; 9-12 English, Soc. Sci., Chem., Biology
58-06-02-00	Schaefer, Robert	Sec. Perm.	7-8 All Subjects; 9-12 Agric., Gen. Sci., Farm Mech.
58-06-10-00	LaBonte, Mark	Sec. Perm.	7-8 All Subjects; 9-12 Science, Ind. Arts, Soc. Sci.
58-06-13-00	Nearpass, Don	Sec. Perm.	7-8 All Subjects; 9-12 P.E., Phys. Sci., Soc. Sci., Math

	retired 6/81		
59-01-09-00	Troyer, Carol	Sec. Perm.	7-8 All Subjects; 9-12 English, Music Theory; K-12 P.S. Mus.
59-03-24-00	Pultz, Peter	Sec. Perm.	7-8 All Subjects; 9-12 Math, Physics, Phys. Educ.
59-05-07-00	Klomparens, Frank	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Ed., Soc. Sci., Ind. Arts
59-09-15-00	Minor, Abby Lou	Elem. Perm.	K-8 All Subjects
60-03-28-00	Brenton, Rhoda	Elem. Perm.	K-8 All Subjects
60-04-02-00	Dearing, Nancy	Elem. Perm.	K-8 All Subjects
60-04-25-00	Yarmer, Marjorie	Elem. Perm.	K-8 All Subjects
60-05-02-00	Winters, Harold	Sec. Perm.	7-8 All Subjects; 9-12 Nat. Sci., Biol., Chem., German
60-05-13-00	Okonek, Frances	Sec. Perm.	7-8 All Subjects; 9-12 English, History, K-12 Library Science
60-05-23-00	Rappleye, Donald	Sec. Perm.	7-8 All Subjects; 9-12 Geog., Soc. Sci., Biology
60-05-25-00	(M)Breeding, Carl	Sec. Perm.	7-8 All Subjects; 9-12 Math, Chemistry, Phys. Science
60-05-27-00	Wright, Robert	Sec. Perm.	7-8 All Subjects; 9-12 Biology, History, Math; K-12 Phys. Ed.

60-06-03-00	Niedzielski, Ronald	Elem. Perm.	K-8 All Subjects; K-12 Speech Correction
60-06-08-00(M)	Smith, Harry	Sec. Perm.	7-8 All Subjects; 9-12 History, Social Science
60-07-18-00	Graham, Dorothy	Sec. Perm.	7-8 All Subjects; 9-12 History, Spanish, French
60-08-16-00	Fisher, Keith	Sec. Perm.	7-8 All Subjects; 9-12 Bus. Education, Social Science
60-08-17-00	Weible, Margaret	Elem. Perm.	K-8 All Subjects
60-09-03-00	Lameika, Orthella	Elem. Perm.	K-8 All Subjects
60-09-28-00	Rossman, Marilyn	Elem. Perm.	K-8 All Subjects
61-02-07-00	Server, Margaret	Elem. Perm.	K-8 All Subjects
61-05-01-00	McConnell, Helen	Elem. Perm.	K-8 All Subjects
61-05-26-00	Bernardon, Milo	Sec. Perm.	7-8 All Subjects; 9-12 Physics, Geology, Math, Driver & Safety Education
61-06-01-00	Chipman, Herbert	Elem. Perm.	K-8 All Subjects
61-06-05-00	Nordman, Charles	Sec. Perm.	7-8 All Subjects; 9-12 Spanish, Other
61-07-03-00	Avis, Myrtle	Elem. Perm.	K-8 All Subjects; Consultant for Mentally Handicapped

61-08-02-00	Brant, Barbara	Sec. Perm.	7-8 All Subjects; 9-12 English, Speech; K-12 Deaf Education, Speech Correction
61-08-16-00	Hall, Jeanette	Elem. Perm.	K-8 All Subjects
61-08-17-00	Garnett, Kenneth	Elem. Perm.	K-8 All Subjects
61-08-29-00	Darling, Ollie	Elem. Perm.	K-8 All Subjects
61-10-23-00	Doty, Marguerite	Sec. Perm.	7-8 All Subjects; K-12 Art
61-11-22-00(M)	Simmons, Ernestine	Elem. Perm.	K-8 All Subjects; K-12 P.E.
62-01-14-00	Blake, Peter	Sec. Perm.	7-8 All Subjects; 9-12 Speech, Social Science, English
62-02-21-00	Runkel, Thomas	Sec. Perm.	7-8 All Subjects; 9-12 Soc. Sci., Accounting & Law, English, Secretarial Training
62-04-06-00	Collins, Rheta	Elem. Perm.	K-8 All Subjects; School Social Worker
62-05-09-00	Valas, Dale	Sec. Cont. Full Voc. Cert.	7-8 All Subjects; 9-12 Econ., Bus. Education, Social Science; 9-12 Voc. Bus. Educ., General Office Clerical, Steno & Secretarial; Typing & Related Occupations, Clerical & Secre. Lab.
62-05-24-00	Hagey, Dorothy	Elem. Perm.	K-8 All Subjects

	retired		
62-06-02-00	(M) Williams, Libra	Elem. Perm.	K-8 All Subjects
62-06-12-00	Wheeler, Darrel	Sec. Perm.	7-8 All Subjects; 9-12 Math, Chemistry, Phys. Science
62-06-19-00	Haselswerdt, Jean	Elem. Perm.	K-8 All Subjects
62-06-20-00	Walters, Beverly	Elem. Perm.	K-8 All Subjects
62-07-23-00	Krumm, Kathleen	Sec. Perm.	7-8 All Subjects; 9-12 English, Social Science
63-02-01-00	Straayer, Carole	Elem. Perm.	K-8 All Subjects
63-02-28-00	Damm, Jane	Elem. Perm.	K-8 All Subjects
63-03-11-00	Fischer, Ernest	Sec. Cont.	7-8 All Subjects; 9-12 Science, Biology, Geology-Earth Science
63-04-17-00	Young, James	Sec. Perm.	7-8 All Subjects; 9-12 Math, General Science, Soc. Sci.
63-05-23-00	Shipley, Loren	Elem. Perm.	K-8 All Subjects
63-05-27-00	Goodrich, Sally	Sec. Perm.	7-8 All Subjects; 9-12 Sociology, English; K-12 Phys. Education
63-05-31-00	Skinkle, Russell	Sec. Perm.	7-8 All Subjects; K-12 Music
63-06-03-00	Vince, Kenneth	Sec. Perm.	7-8 All Subjects; K-12 P.S. Music, 9-12 Music Theory, English

63-06-04-00	Carey, Jerry	Sec. Perm.	7-8 All Subjects; 9-12 History, Soc. Sci., Science; K-12 Guid. Counselor
63-06-05-00	Nessing, Diane	Sec. Perm.	7-8 All Subjects; 9-12 Arts & Crafts; K-12 Art
63-06-13-00	Hauer, Zelpha	Sec. Perm.	7-8 All Subjects; 9-12 Science, Soc. Sci., Math, Guidance Coun.
63-06-14-00	Mack, Lawrence	Sec. Perm.	7-8 All Subjects; 9-12 History, Journalism, Soc. Sci.
63-06-17-00	Herendeen, Dwight	Sec. Perm.	7-8 All Subjects; K-12 Ment. Hand.; 9-12 Health, P.E., Soc. Sci., Biol.
63-06-26-00	Pombier, Cyril	Sec. Perm.	7-8 All Subjects; 9-12 Speech, Soc. Sci., Sociology
63-06-26-00	Sierra, Ben	Sec. Perm.	7-8 All Subjects; 9-12 Spanish, Phys. Education, Soc. Science
63-07-02-00	Drake, Patricia	Elem. Perm.	K-8 All Subjects
63-07-08-00	Topping, Laura	Sec. Perm.	7-8 All Subjects; 9-12 Biology, Science, Phys. Science; K-12 Physical Education
63-07-10-00	McCloskey, Dorothy	Sec. Perm.	7-8 All Subjects; 9-12 English, Speech, Latin

63-07-18-00	Gibbs, Dorthy	Sec. Perm.	7-8 All Subjects; 9-12 Speech, Science, Home Economics, Voc. Home Economics
63-07-18-00	Phelan, David	Elem. Perm.	K-8 All Subjects
63-07-22-00	Taylor, William	Sec. Perm.	7-8 All Subjects; K-12 Art; 9-12 History, English
63-07-25-00	Nidelcheff, Marjorie	Sec. Perm.	7-8 All Subjects; 9-12 Home Economics, Foods, English
63-07-29-00	DeOrio, Victor	Sec. Perm.	7-8 All Subjects; 9-12 Biology; K-12 Health, Phys. Educ.
63-07-30-00	Hallawell, Charles	Sec. Perm.	7-8 All Subjects; 9-12 Spanish, Science, Business Education
63-08-04-00	(M) Winfield, Mary	Elem. Perm.	K-8 All Subjects
63-08-29-01	Wilcox, Arnold	Elem. Perm.	K-8 All Subjects; 9-12 Health, Physical Education
63-08-29-02	Wilcox, Charlene	Elem. Perm.	K-8 All Subjects
63-12-18-00	Hansen, Geraldine	Elem. Perm.	K-8 All Subjects
63-12-19-00	Kaupp, Jeannette	Elem. Perm.	K-8 All Subjects
64-03-19-00	Wilson, Maurice *retired*	Elem. Perm.	K-8 All Subjects
64-03-24-00	Donnelly, Doris	Elem. Perm.	K-8 All Subjects

64-03-31-00	King, Caroline	Elem. Perm.	K-8 All Subjects
64-04-02-00	Minor, James	Elem. Perm.	K-8 All Subjects
64-06-12-00	Ritsema, Virginia	Elem. Perm.	K-8 All Subjects
64-06-13-00	Nordrum, Flossiemæ	Elem. Cont.	K-8 All Subjects; K-12 Ment. Handicapped, Learning Dis.
64-06-13-00	Abbott, Dolores	Elem. Perm.	K-8 All Subjects
64-06-19-00	Mohre, Kay	Sec. Perm.	7-8 All Subj.; K-12 Phys. Ed.; 9-12 History, French
64-07-01-00	Bogart, Daniel	Sec. Perm.	7-8 All Subjects; K-12 Music
64-07-05-00	Cushman, Arwilda	Elem. Perm.	K-8 All Subjects
64-07-10-00	Sargent, Charles	Elem. Perm.	K-8 All Subjects
64-07-14-00	Greene, Byron	Sec. Perm.	7-8 All Subjects; K-12 P.S. Music, 9-12 Music Theory, Applied Music
64-07-16-00	Elder, Donna	Sec. Perm.	7-8 All Subjects; K-12 Health, Phys. Educ.; 9-12 Soc. Science
64-07-21-00	Zimmerman, Richard	Sec. Perm.	7-8 All Subjects; 9-12 English, Social Science
64-07-23-00	Von Schmittou, Donna	Sec. Perm.	7-8 All Subjects; 9-12 English Spanish, Social Science
64-09-04-00	Henderson, Violet	Elem. Perm.	K-8 All Subjects; K-12 Guid. Counselor

64-10-14-00	Scholin, Mattie	Elem. Perm.	K-8 All Subjects
64-11-19-00	Rumler, James	Elem. Perm.	K-8 All Subjects
64-11-28-00	Hite, Janice	Elem. Perm.	K-8 All Subjects
64-12-01-00	Hora, Mary Ellen	Elem. Perm.	K-8 All Subjects
65-01-21-00	Bable, Lois	Elem. Perm.	K-8 All Subjects
65-02-02-00	Wetters, Ivan	Elem. Perm. Sec. Cont.	K-8 All Subjects; 9-12 Soc. Sci., Poli. Sci., Psychology
65-04-01-00	Zaski, Jon	Sec. Perm.	7-8 All Subjects; K-12 P.E.; 9-12 Soc. Sci., Health
65-04-20-00	Mueller, Arlene	Elem. Perm.	K-8 All Subjects
65-04-20-00	Mueller, Donald	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Arts, Gen. Science, Math
65-04-22-00	Schwyn, Thomas	Sec. Perm.	7-8 All Subjects; 9-12 Health and Physical Education
65-04-26-00	Scarpino, Rachel	Elem. Perm.	K-8 All Subjects
65-04-30-00	Bucior, Joyce	Elem. Perm.	K-8 All Subjects
65-05-01-00	Rieger, Gertrude	Elem. Perm.	K-8 All Subjects
65-05-03-00	Stanley, Suzanne	Elem. Perm.	K-8 All Subjects
65-05-12-00	Danilowicz, Dale	Elem. Perm.	K-8 All Subjects

65-05-13-00	Smith, Darwin	Sec. Perm.	7-8 All Subjects; K-12 Ment. Hand.; 9-12 Economics, Bus. Educ., Phys. Educ.
65-06-08-00	Daugherty, James	Sec. Perm.	7-8 All Subjects; 9-12 English
65-06-29-00	Riedel. Mary	Elem. Perm.	K-8 All Subjects; K-12 Guidance Counselor
65-07-10-00	Reed, John	Sec. Perm.	7-8 All Subjects; 9-12 Social Science, Bus. Education
65-07-13-00	Adams, Howard J.	Sec. Perm.	7-8 All Subjects; K-12 P.E.; 9-12 Soc. Sci., Biology, Sci.
65-07-13-00	LaBonte, Doris	Sec. Perm.	7-8 All Subjects; 9-12 English, History, Spanish
65-08-05-00	Clardy, Nora	Sec. Perm.	7-8 All Subjects; 9-12 Math, English
65-08-07-00	Sanders, Muriel	Elem. Perm.	K-8 All Subjects
65-08-24-00	Willoughby, Norma *retired 6/81*	Sec. Perm.	7-8 All Subjects; 9-12 Voice, English; K-12 Music
65-11-29-00	Walker, Phyllis	Elem. Cont. Sec. Perm.	K-8 All Subjects; 9-12 Sci., Speech, English
65-12-04-01	Sears, Larry	Elem. Perm.	K-8 All Subjects; 9 Soc. Sci.; 10-12 Spec.
65-12-04-02	Parker, David	Sec. Perm.	7-8 All Subj.; 9-12 Ind. Arts

66-01-04-00	Perry, Mayra	Elem. Perm.	K-8 All Subjects
66-01-16-00	Feldmann, Judith	Sec. Perm.	7-8 All Subjects; 9-12 Soc. Sci., English, Speech, Drama
66-01-27-00	Stratton, Naomi *retired*	Elem. Perm.	K-8 All Subjects
66-02-14-00	Pearse, Lela	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci.
66-03-21-00	Minor, Sue	Elem. Perm.	K-8 All Subjects
66-03-23-00	VanLonkhuyzen, Chris	Sec. Perm.	7-8 All Subjects; 9-12 German, Chemistry
66-04-15-00	Elliott, Todd	Sec. Perm.	7-8 All Subjects; 9-12 Geog.; K-12 Physical Education
66-04-19-00	Garrison, David	Sec. Perm.	7-8 All Subjects; 9-12 History, English, Math
66-04-26-00	Yonker, James	Sec. Perm.	7-8 All Subjects; 9-12 Math, English, Chemistry
66-04-30-00	Smith, Donald	Sec. Perm.	7-8 All Subjects; 9-12 Math, Chemistry, Social Science
66-05-02-00	Blanchard, Dorothy	Elem. Perm.	K-8 All Subjects
66-05-06-00	Watkins, Donald	Sec. Perm.	7-8 All Subjects; 9-12 Math, Chemistry, Physics
66-05-06-00	Kratofil, Joseph	Sec. Perm.	7-8 All Subjects; 9-12 Math, Science, German

66-05-12-00	Bear, Norma	Sec. Perm.	7-8 All Subjects; 9-12 Social Science, Phys. Educ., English
66-05-12-00	Ordway, James	Elem. Perm.	K-8 All Subjects
66-05-15-00	Soviar, Stephen	Sec. Perm.	7-8 All Subjects; 9-12 Bus. Administration, English
66-05-20-00	Yost, Joyce	Elem. Perm.	K-8 All Subjects
66-05-23-00	Marshall, Troy	Elem. Perm.	K-8 All Subjects; K-12 Teacher of Emotionally Impaired
66-05-27-00	Sears, Olga	Elem. Perm.	K-8 All Subjects
66-06-02-00	Horton, Byron	Elem. Perm.	K-8 All Subjects
66-06-03-00	Adams, Howard B.	Sec. Perm.	7-8 All Subjects; 9-12 History, Social Science
66-06-06-00	Hunt, Carol	Elem. Perm.	K-8 All Subjects
66-06-09-00	Strunk, Richard	Elem. Perm.	K-8 All Subjects
66-06-10-00	Jones, Evan	Sec. Perm.	7-8 All Subjects; K-12 P.E.; 9-12 Health, History
66-06-10-00	Cottrell, Patricia	Elem. Const.	K-8 All Subjects; K-12 Orth. Handicapped, Ment. Hand., Teacher of Homebound
66-06-17-00	Janke, Charles	Sec. Perm.	7-8 All Subjects; K-12 P.E.; 9-12 History, Health

66-06-17-00	Donahue, Charles	Sec. Perm.	7-8 All Subjects; 9-12 History, Social Science
66-06-21-00	Garrison, Julie	Elem. Perm.	K-8 All Subjects
66-06-22-00	Olfier, Suzanne	Elem. Perm.	K-8 All Subjects
66-06-23-00	Toll, Henry	Sec Perm.	7-8 All Subjects; 9-12 History, Poli. Sci., Geography
66-07-16-00	Schneider, Peter	Sec. Perm.	7-8 All Subjects; K-12 Ind. Arts; 9-12 Math, Geography
66-07-21-00	Slugay, Myra	Elem. Prem.	K-8 All Subjects
66-08-12-00	Anderson, Linda	Elem. Prem.	K-8 All Subjects
66-08-13-00	Heerspink, Roger	Sec. Prem.	7-8 All Subjects; 9-12 German, English, History
66-08-22-00	Tietjen, Charles	Sec. Perm.	7-8 All Subjects; 9-12 Soc. Sci.. Guid. Coun.; K-2 P.E.
66-10-12-00	DeBruler, Yvonne	Sec. Perm.	7-8 All Subjects; K-12 P.E.; 9-12 Health, Speech
66-10-25-00	Henry, Nancie	Elem. Prem.	K-8 All Subjects
67-05-04-00	Arducant, Jeane	Sec. Perm.	7-8 All Subjects; 9-12 History, English
67-05-08-00	Gillett, John	Elem. Prem.	K-8 All Subjects
67-05-16-00	Snyder, Dale	Elem. Prem.	K-8 All Subjects

67-05-24-00	McCormick, Carolyn	Elem. Prem.	K-8 All Subjects
67-05-25-00(M)	Dungy, Cleomae	Sec. Perm.	7-8 All Subjects; 9-12 English, Speech
67-05-25-00	Schaefer, Beverly	Elem. Prem.	K-8 All Subjects
67-06-08-00	Nowlin, Dolores	Elem. Prem.	K-8 All Subjects
67-06-23-00	Maher, Sandra	Elem. Prem.	K-8 All Subjects
67-06-23-00	Conrad, Charles	Sec. Perm.	7-8 All Subjects; 9-12 History, Psychology, Soc. Sci., German
67-06-26-00	Espie, Patricia	Elem. Perm.	K-8 All Subjects; 9-12 Teacher of the Blind
67-06-28-00	Spaan, Mary Ann	Elem. Perm.	K-8 All Subjects; 9-12 Health, Phys. Educ.
67-07-03-00	VanderLee, Bert	Sec. Perm.	7-8 All Subjects; 9-12 Biology, History, Latin
67-07-05-00	Dulworth, Jacqueline	Sec. Cont. Full Voc.	7-8 All Subjects; 9-12 Bus. Ed., Soc. Sci., Dist. Ed., History, English; 9-12 Voc. Dist. Educ., Bus. Ed.; Gen. Off. Cler., Steno & Sec., Typing and Related Occ.
67-07-13-00	Ragain, Charles	Elem. Perm.	K-8 All Subjects
67-07-19-00	Kemp, Lora	Sec. Perm.	7-8 All Subjects; K-12 Art; 9-12 English, Social Science

67-07-20-00	Brown, Edwin	Sec. Perm.	7-8 All Subjects; 9-12 History, Soc. Sci.
67-08-07-00	(M) Bowles, Hazel	Elem. Perm.	K-8 All Subjects
67-08-08-00	Holton, Garry	Sec. Perm.	7-8 All Subjects; 9-12 English, Sociology
67-08-23-00	Karas, Raymond	Sec. Perm.	7-8 All Subjects; 9-12 Latin, Russian, Soc. Sci.
67-09-25-00	Schwemin, Shirlee	Elem. Perm.	K-8 All Subjects
67-10-11-00	Peterson, David	Elem. Cont.	K-8 All Subjects; 9 History, Soc. Sci., Lang. Arts
67-10-12-00	Penive, Donald	Sec. Perm.	7-8 All Subjects; 9-12 Math, Physical Science
67-11-20-00	Dwyer, Kathleen	Elem. Perm.	K-8 All Subjects; 9-12 Teacher Counsellor, Mentally Handicapped
67-12-01-00	O'Neil, Margaret	Elem. Perm.	K-8 All Subjects
68-02-03-00	Gilbert, Edythe	Sec. Cont.	7-8 All Subjects; K-12 Art
68-02-06-00	Hertler, Carlene	Elem. Perm.	K-8 All Subjects
68-03-05-00	Laxson, John	Elem. Perm.	K-8 All Subjects
68-04-01-00	Stahle, David	Sec. Perm. Full Voc. Cert.	7-8 All Subjects; 9-12 Geog., Commerce; Voc. Ed. Bus. Educ., Computing; Data Proc./

	Retired		
68-04-03-00	Bruce, Margaret	Elem. Perm.	K-8 All Subjects; K-12 Music Bus.; Gen. Off. Cler.; Type & Related Occupations
68-04-15-00	Baird, Gary	Sec. Perm.	7-8 All Subjects; 9-12 P.E., Biology
68-04-19-00	Young, Gertrude	Elem. Perm.	K-8 All Subjects
68-04-22-00	(M) Anderson, Patricia	Elem. Perm.	K-8 All Subjects
68-04-26-00	Larson, Richard	Sec. Perm.	7-8 All Subjects; 9-12 History, Math
68-05-09-00	Matteson, Sally	Elem. Perm.	K-8 All Subjects
68-05-25-00	Moore, Donna	Sec. Perm. Voc. Cert.	7-8 All Subj.; 9-12 Home Ec., Science, Language Arts; Consumer and Homemaking
68-05-29-00	(M) Herndon, Charlotte	Sec. Perm.	7-8 All Subjects; 9-12 Health; K-12 Physical Education
68-06-04-00	DeOrio, Mary	Sec. Perm.	7-8 All Subjects; K-12 Art
68-06-10-00	Hauser, H. Martin	Sec. Perm.	7-8 All Subjects; 9-12 History; K-12 Ind. Arts
68-06-12-00	(M) Cerqueira, Frank	Sec. Perm.	7-8 All Subjects; 9-12 Soc. Sci.; K-12 Health, Phys. Educ.
68-06-27-00	Kerwin, Sandra	Elem. Perm.	K-8 All Subjects

68-07-26-00	Shepherd, Barbara	Elem. Cont. Sec. Cont. Voc. Cert.	K-8 All Subjects; K-12 Home Ec.; Voc. Home Econ.; Consumer & Homemaking
68-08-05-00	Spieldenner, Robert	Elem. Perm.	K-8 All Subjects; School Psychologist
68-08-27-00	Richard, Lyle	School Social Worker	
68-09-01-00	Horton, John	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Arts
68-09-01-00	Spaulding, Ken	Sec. Perm.	7-8 All Subjects; K-12 Music; 9-12 Poli.Sci., Voice
68-09-01-00	Stinnet, LaNelle	Elem. Perm.	K-8 All Subjects
68-09-01-00	Sylvester, Reynold	Sec. Cont.	7-8 All Subjects; 9-12 Soc. Sci., History, Biology; K-12 Ment. Handicapped
68-09-01-00	Wuckert, Esther	Elem. Perm.	K-8 All Subjects
68-09-03-00	Henley, Beverly	Elem. Perm.	K-8 All Subjects
68-09-06-00	Boyle, Elizabeth	Elem. Perm.	K-8 All Subjects
68-09-09-00	Kelly, Lois	Elem. Cont.	K-8 All Subjects
69-09-12-00	Gish, John	Sec. Perm.	7-8 All Subjects; 9-12 History, Economics

68-09-13-01	Musselman, Ann	Sec. Cont.	7-8 All Subjects; 9-12 Physical Science; K-12 Voc. Home Econ.; 7-12 Guidance Counselor
68-09-13-02	Perry, Roger	Sec. Perm.	7-8 All Subjects; 9-12 Science, Math, Biology; K-12 Guid. Coun.
68-09-30-01	Larson, Donald	Sec. Cont. Elem. Cont.	K-8 All Subjects; 9-12 Gen. Sci., Geology, Soc. Sci., Earth Science
68-09-30-02	Snyder, Joyce	Elem. Perm.	K-8 All Subjects
68-10-01-00	Spaan, Arnold	Elem. Cont.	K-8 All Subjects
68-10-07-00	McNulty, Susan	Sec. Perm.	7-8 All Subjects; 9-12 History, Social Science
68-10-18-00	Stutesman, Philip	Sec. Perm.	7-8 All Subjects; 9-12 Biology, Chemistry, Social Science
68-10-26-00	Lawrence, Diane	Elem. Perm.	K-8 All Subjects
68-11-01-00	Brinkle, Judy	Elem. Perm.	K-8 All Subjects
68-11-22-00	(M)Ross, Frances	Elem. Perm.	K-8 All Subjects
68-11-28-00	Winfrey, Annabelle	Elem. Perm.	K-8 All Subjects
68-12-30-00	Marvin, Janet	Elem. Perm.	K-8 All Subjects
69-01-02-00	Heathman, Susan	Sec. Perm.	7-8 All Subjects; 9-12 P.E., Agriculture

69-01-15-00	Stevens, Mark	Sec. Perm.	7-8 All Subjects; 9-12 English, Social Science
69-01-18-00	Yost, Paul	Sec. Perm.	7-8 All Subjects; 9-12 Social Science, English
69-01-26-00	Raut, John	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Arts; K-12 Phys. Educ.
69-02-25-00	Strzalkowski, Theresa	Elem. Cont.	K-8 All Subjects
69-02-26-00	Burnett, Ray	Sec. Perm.	7-8 All Subjects; 9-12 Music Theory, Soc. Sci.; K-12 Music
69-03-14-00	Foster, Anne	Elem. Cont.	K-8 All Subjects; 9 Psych., English, French, Soc. Sci.
69-03-24-00	Phipps, Lawrence	Elem. Perm.	K-8 All Subjects; K-12 Deaf Ed., Physically Handicapped
69-04-01-00	Markiewicz, Ruth	Elem. Perm.	K-8 All Subjects
69-04-11-00	Bean, Don	Sec. Cont.	7-8 All Subjects; K-12 Health, Rec. & P.E.; 9-12 Science, Language Arts
69-04-13-00	Bender, Norma	Elem. Perm.	K-8 All Subjects; K-12 Deaf Ed.
69-05-12-00	DeLaet, Mary	Elem. Perm.	K-8 All Subjects; K-12 Homebound, Hospitalized, Orth. Handicapped

69-05-15-00	Ragonesi, Anthony	Elem. Perm.	K-8 All Subjects; 9-12 Ment. Handicapped
69-06-03-00	Hall, Alice	Sec. Perm.	7-8 All Subjects; K-12 Art; 9-12 Math, History
69-06-06-00	Barone, William	Sec. Perm.	7-8 All Subjects; K-12 Music
69-06-08-00	Kiesel, David	Sec. Perm.	7-8 All Subjects; 9-12 Psychology, Social Science Political Science
69-06-09-01	(M) Martin, James	Sec. Perm.	7-8 All Subjects; 9-12 History, Geography, Industrial Arts
69-06-09-02	Tonnemacher, Sally	Elem. Perm.	K-8 All Subjects; School Psychologist
69-06-10-00	Bluhm, Leonard	Sec. Perm.	7-8 All Subjects; K-12 Art
69-06-19-00	Verhoeven, Martha	Sec. Perm.	7-8 All Subjects; 9-12 Soc. Sci.; K-12 Guid. Counselor
69-06-25-00	Earle, Martha	Elem. Perm.	K-8 All Subjects
69-07-03-00	Weeks, Robert	Elem. Cont.	K-8 All Subjects
69-07-10-01	Landolfi, Anthony	Sec. Cont.	7-8 All Subjects; 9-12 Soc. Sci., History, Psychology, School Social Worker; K-12 Emot. Dist.
69-07-10-02	Ross, William	Sec. Perm	7-8 All Subjects; 9-12 Ind. Arts, Soc. Sci., Safety & Driver Educ.

69-07-16-00	Testa, Norma	Elem. Perm.	K-8 All Subjects; K-12 Guidance Counselor
69-07-23-00	Ikins, Robert	Sec. Cont.	7-8 All Subjects; K-12 P.E.; 9-12 History; 7-12 Guidance Counselor
69-07-26-00	McKeown, Sharon	Elem. Perm.	K-8 All Subjects
69-08-01-00	Peters, Ruth	Sec. Perm.	7-8 All Subjects; K-12 Lib. Sci.; 9-12 Home Ec., English, Science; 9-12 Voc. Home Economics
69-08-04-00	Hinkle, Linda	Elem. Perm.	K-8 All Subjects
69-08-06-00(M)	Thompson, Arme	Elem. Perm.	K-8 All Subjects
69-08-09-00	Robinson, Colette	Sec. Perm.	7-8 All Subjects; 9-12 French, Social Science
69-08-14-00	Bymhold, Mary	Elem. Perm.	K-8 All Subjects
69-08-21-00	Rieman, Jill	Sec. Perm.	7-8 All Subjects; 9-12 History, English, Home Economics
69-08-25-01	Cox, Norma *retired 12/81*	Elem. Perm.	K-8 All Subjects
69-08-25-02(M)	Kilgore, Herman	Elem. Cont.	K-8 All Subjects; 9-12 Agric. Educ., Science, Biology, Health, Phys. Ed. and Recreation
69-08-26-00	Bodemer, Susanne	Elem. Perm.	K-8 All Subjects

69-08-27-00	Driscoll, David	Sec. Perm.	7-8 All Subjects; 9-12 Biology, Soc. Science, Phys. Education
69-08-29-00	Janke, Paula	Sec. Perm.	7-8 All Subjects; 9-12 English, History
69-08-30-00	Shipley, Patsy	Elem. Perm.	K-8 All Subjects
69-09-02-00(M)	Kilgore, Lonnie	Elem. Cont.	K-8 All Subjects
69-09-29-00	Parker, Linda	Sec. Perm.	7-8 All Subjects; 9-12 English, Social Science
69-10-17-00	Winzeler, Everett	Sec. Perm.	7-8 All Subjects; 9-12 Biology, Soc. Sci.; K-12 Ment. Hand.
69-11-03-00	Village, John	Sec. Perm.	7-8 All Subjects; 9-12 Math, Science
69-11-13-00	Staska, Robert	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Arts
69-12-04-00	Gerry, Donna	Elem. Perm.	K-8 All Subjects; K-12 Physical Education
69-12-95-00	Liebner, Joan	Sec. Perm.	7-8 All Subjects; 9-12 French, Spanish, Soc. Sci.
69-12-19-00(M)	Muray, Bettie	Elem. Perm.	K-8 All Subjects; K-12 Ment. Handicapped

70-01-13-01	Madison, James	Sec. Cont.	7-8 All Subjects; 9-12 History, Soc. Sci., German; K-12 Guid. Counselor
70-01-13-02	Dodge, Sue	Elem. Perm.	K-8 All Subjects
70-01-14-00	Greep, Suzette	Elem. Perm.	K-8 All Subjects; K-12 Speech Correction
70-02-17-00	Johnson, Blythe	Elem. Perm.	K-8 All Subjects
70-02-26-00	Vogel, Pennie	Elem. Perm.	K-8 All Subjects; K-12 Ment. Handicapped
70-06-05-00	Putnins, Barbara		School Psychologist
70-06-18-00	Egeler, Gloria	Sec. Perm.	7-8 All Subjects; 9-12 Applied Music, Music Theory, English, Speech
70-07-01-00	Bliss, Helen	Elem. Cont.	K-8 All Subjects; K-12 Ment. Hand.; 9 Social Science
70-07-12-00(M)	Jackson, Eugene	Sec. Perm.	7-8 All Subjects; 9-12 Ind. Arts
70-07-18-00(M)	Hutchinson, Carol	Sec. Cont.	7-8 All Subjects; 9-12 English; K-12 Library Science
70-08-12-00	Heiden, Margo	Elem. Cont.	K-8 All Subjects; 9-12 French, Biology

70-08-20-00(M)	Beamon, Bobby	Sec. Cont.	7-8 All Subjects; 9-12 Ind. Arts
70-09-01-00	Mynard, Perry	Sec. Perm.	7-8 All Subjects; 9-12 Speech, English
70-09-04-01	Kopper, Elwood	Sec. Cont.	7-8 All Subjects; K-12 Speech Correction, 9-12 Soc. Sci.
70-09-04-02	Chipman, Pat	Sec. Cont. Voc. Cert.	7-8 All Subjects; 9-12 Home Ec., Soc. Sci.; K-12 Voc. Home Econ.
70-09-09-00	Collins, Thomas	Sec. Perm.	7-8 All Subjects; 9-12 English, History, Speech
70-09-18-01	Danby, Kay	Sec. Perm.	7-8 All Subjects; K-12 Speech Corr.; 9-12 Soc. Sci., Speech
70-09-18-02	Patton, Susan	Elem. Perm.	K-8 All Subjects
70-09-24-00	Kiesel, Sharon	Elem. Perm.	K-8 All Subjects; K-12 Ment. Handicapped
70-11-06-00(M)	Wade, Ernestine	Elem. Perm.	K-8 All Subjects
70-11-19-00	Derry, Suzanne	Elem. Cont.	K-8 All Subjects; K-12 Ment. Hand.; 9 Lang. Arts, Soc. Sci.; K-12 Learning Disabilities
70-11-30-00	Arner, Agnes	Elem. Cont.	K-8 All Subjects; 9 Lang. Arts, Science, Soc. Sci.
70-12-08-00	Venners, Mary S.	Elem. Perm.	K-8 All Subjects

71-01-12-00	Leach, Bonnie	Elem. Perm.	K-8 All Subjects
71-02-15-00	Ranieri, Marilyn	Elem. Perm.	K-8 All Subjects
71-02-24-00	Gillette, Kathleen	Elem. Cont.	K-8 All Subjects; 9 English, Social Science
71-04-16-00	Bowers, Janette	Sec. Perm.	7-8 All Subjects; K-12 Health, P.E. & Recreation
71-04-17-00	Hoffman, Penny	Sec. Perm.	7-8 All Subjects; 9-12 Psych.; K-12 Speech Correction
71-06-07-00	Elder, Amy	Elem. Perm.	K-8 All Subjects
71-06-17-00	Skomedal, Pat	Elem. Cont.	K-8 All Subjects; K-12 Emot. Dist.; K-12 Learn. Disabilities
71-06-24-00	Jackson, Sharon	Elem. Perm.	K-8 All Subjects
71-09-09-00	Moe, Mary	Elem. Cont.	K-8 All Subjects; 9 English, Social Science
71-09-12-00	Garnaat, Marjorie	Elem. Cont.	K-8 All Subjects
71-09-17-00(M)	Sims, Derry	Elem. Cont.	K-8 All Subjects; 9 Social Science, Health, PE & Rec.
71-09-24-00(M)	Reeves, Donnie	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci.
71-09-30-00	Bullen, Valerie	Sec. Perm.	7-8 All Subjects; 9-12 German, History, Political Science
71-10-18-00(M)	Garlington, Jimmy	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci.

71-10-22-00	Sheridan, Andrew	Sec. Cont.	7-8 All Subjects; 9-12 Soc. Sci.; K-12 Phys. Educ.
71-10-25-00(M)	Arvizu, David	Sec. Cont.	7-8 All Subjects; 9-12 Health; K-12 Physical Education
71-11-08-00	Shamka, Sharon	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci., Science, Lang. Arts
71-12-02-00	Miller, Nancy	Elem. Cont.	K-8 All Subjects
71-12-07-01(M)	Davis, Artie	Elem. Cont.	K-8 All Subjects; 9 English; K-12 Emotionally Disturbed
71-12-08-00(M)	Sanders, Mary	Elem. Cont.	K-8 All Subjects; 9 English, Social Science
71-12-24-00(M)	Johnson, Doris	Elem. Cont.	K-8 All Subjects
71-12-31-00(M)	Williams, Sarah	Sec. Cont.	7-8 All Subjects; 9-12 English Health
72-02-08-00(M)	Ellis, Patsy	Voc. Cert. Sec. Prov. 86	Special Needs 7-8 All Subjects; 9-12 Soc. Sci., 9-12 Secretarial Science
72-03-13-00(M)	Sims, Irma	Elem. Cont.	K-8 All Subjects
72-05-24-00	Schlicklin, Julie	Elem. Perm.	K-8 All Subjects; Early Childhood Specialty

72-06-04-00	Holton, Gordon	Sec. Cont.	7-8 All Subjects; K-12 P.E.; 9-12 Soc. Sci.; K-12 Guid. Counselor
72-06-23-00	Furtwangler, Betty	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci., Lang. Arts; K-12 Ment. Hand., Learning Disabled
72-06-28-00	Sawicki, Elizabeth	Elem. Cont.	K-8 All Subjects; K-12 Ment. Hand.; 9 Eng., Soc. Science
72-07-01-00	Marshall, Gretchen	Sec. Perm.	7-8 All Subjects; K-12 Speech Correction
72-07-26-00	Bullinger, Mary Ellen	Elem. Cont.	K-8 All Subjects; 9 Fine Arts; K-12 Emot. Dist., Learning Disabled
72-07-31-00(M)	Reeves, Frances	Elem. Cont.	K-8 All Subjects; 9 English, Social Science
72-08-27-00(M)	Brantley, Pearlie	Elem. Cont.	K-8 All Subjects
72-08-29-00(M)	Conner, Chlorita	Elem. Cont.	K-8 All Subjects; 9 P.E., Social Science
72-08-30-00	Buseth, Carolee	Elem. Cont.	K-8 All Subjects; 9 Lang. Arts
72-09-02-00	Wurster, Paul	Elem. Cont. Sec. Cont.	K-8 All Subjects; 9-12 History, Geography; K-12 Guid. Coun.
72-09-05-00	Rohde, Carol	Elem. Cont.	K-8 All Subjects; 9 English, Social Science

72-09-06-00(M)	Malone, Harold	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci.
72-09-21-00(M)	Griffin-Carter, Lucy	Elem. Cont. Sec. Cont.	K-8 All Subjects; 9-12 Soc. Sci.; 7-12 Guidance Counselor
72-11-03-00	Caspar, Joan	Elem. Cont.	K-8 All Subjects; 9 English, Science, Soc. Science
72-11-09-00	Brian, Linda	Sec. Prov. 81	7-8 All Subjects; 9-12 Soc. Sci.; K-12 Speech Correction
72-11-22-00(M)	Fobbs, Ava	Elem. Prov. 81	K-8 All Subjects; 9 Science, History
72-12-26-00	Cudworth, Judith	Elem. Prov. 80	K-8 All Subjects; K-12 Deaf Educ.; 9 Fine Arts
73-02-12-00(M)	Alexander, Barbara	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci., Health, PE & Recreation
73-02-29-00(M)	Kolb, Mary	Sec. Cont.	7-8 All Subjects; 9-12 Bus. Ed., Social Science
73-03-26-00	Snell, Carolyn	Sec. Perm.	7-8 All Subjects; 9-12 Math., Spanish
73-03-28-00	Laughrey, Margaret	Sec. Cont.	7-8 All Subjects; 9-12 English
73-03-29-00	Venners, Margaret	Elem. Cont.	K-8 All Subjects; 9 Lang. Arts, Social Science
73-07-11-00	Formolo, Judy	School Social Worker	

73-07-19-00	Strohl, Ruth	Sec. Cont.	7-8 All Subjects; K-12 Speech Correction
73-08-17-00	Macchia, Linda	Elem. Cont.	K-8 All Subjects; 9 Recreation; K-12 Emotionally Disturbed, Learning Disabled
73-08-22-00	Olsen, Dennis	Elem. Cont. Sec. Cont.	K-8 All Subjects; 9-12 Math, Chemistry, Biology
73-08-28-01(M)	Clark, Ronald	Sec. Cont.	7-8 All Subjects; 9-12 P.E., Political Science
73-08-28-02	Krenkel, John	Sec. Prov. 82	7-8 All Subjects; 9-12 English, Social Science
73-08-28-03(M)	Hiram, Lambert	Sec. Perm.	7-8 All Subjects; 9-12 Bus. Ed.; K-12 Health, P.E. & Rec.
73-08-28-04	Wygmans, Hugh	Sec. Cont.	7-8 All Subjects; 9-12 Science, Biology; K-12 Emot. Dist.
73-08-29-01	Mark, Betsy	Elem. Cont.	K-8 All Subjects; K-12 Ment. Hand., Orth. Hand., Homebound, Emotionally Disturbed
73-08-29-02	Burnette, Ronald	Sec. Cont.	7-8 All Subjects; K-12 Music
73-09-04-01(M)	Kendrick, Samella	Elem. Cont.	K-8 All Subjects; 9 English
73-09-04-02	Hamilton, Kenneth	Voc. Cert.	Construction & Maintenance

73-09-10-00(M)	Hemphill, Barbara	Elem. Cont.	K-8 All Subjects; Early Childhood Specialty
73-09-11-00	Cole, Jeanette	Elem. Cont.	K-8 All Subjects; 9 Fine Arts
73-09-13-00	Weimer, Barbara	Elem. Perm.	K-8 All Subjects
73-09-20-00	Cooper, Sharon	Elem. Prov. 83 Sec. Cont.	K-8 All Subjects; K-12 Music
73-09-21-00	Rohatynski, Marcia	Sec. Cont.	7-8 All Subjects; K-12 Art
73-09-28-00	Long, Nanette	Elem. Cont.	K-8 All Subjects; 9 Science
73-10-02-00	Mitchell, David	Sec. Cont.	7-8 All Subjects; 9-12 History, English
73-11-30-00	Village, Mary Ellen	Elem. Perm.	K-8 All Subjects
73-12-07-00(M)	Burton, Robert	Sec. Cont.	7-8 All Subjects; 9-12 P.E., Social Science
74-01-27-00	Foster, Betty	Sec. Perm.	7-8 All Subjects; K-12 Music, Guidance Counselor
74-02-15-00(M)	Beers, Lamora	Elem. Perm.	K-8 All Subjects
74-02-18-00	Fink, Linda	Elem. Prov. 82	All Subjects; 9 English, Social Science
74-02-19-00	Chenault, Lynn	Elem. Perm.	K-8 All Subjects
74-02-21-00	Dawson, Sally	Elem. Cont.	K-8 All Subjects; 9-12 History, Social Science, German

74-02-24-00(M)	Cogswell, Geraldine	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci.; K-12 Reading
74-04-04-00	Timmer, Wendy	School Social Worker	
74-05-14-00(M)	Davis, Virginia	Sec. Cont.	7-8 All Subjects; 9-12 Bus. Ed.
74-08-14-00	Kridler, Warren	Sec. Cont.	7-8 All Subjects; 9-12 Science, Vocational Electronics, Math
74-08-21-00	Cochran, Jeanne	Sec. Prov. 83	7-8 All Subjects; 9-12 Speech; K-12 Physical Education
74-08-23-00	VanLonkhuyzen, Lucy	Sec. Cont.	7-8 All Subjects; K-12 Music; 9-12 English
74-08-28-01	Wells, Harry	Sec. Cont.	7-8 All Subjects; 9-12 Poli. Science, Distributive Educ., Voc. Educ. Dist. Educ.
		Full Voc.	Distributive Education
74-08-28-02	Smoots, Robert	Sec. Cont.	7-8 All Subjects; K-12 Ind. Arts
74-09-03-00	Crecine, Kathleen	Elem. Cont.	K-8 All Subjects; K-12 Speech Correction
74-09-05-00	Colleur, Edwin	Voc. Cert.	Welding and Cutting
74-09-06-00	Klop, Phyllis	Sec. Prov. 80	7-8 All Subjects; 9-12 Math, Art
74-09-30-00(M)	Bostic, Joye	Elem. Cont.	K-8 All Subjects; 9 English

74-10-01-00(M)	Delph, Teressa	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci.
74-10-15-00	Lamm, Susan	Sec. Cont.	K-8 All Subjects; 9-12 Health; K-12 Phys. Education
74-12-24-00	Mroz, Carol	Elem. Cont.	K-8 All Subjects; K-12 Emot. Disturbed; School Social Worker
75-04-03-00	Keefer, George	Elem. Cont. Sec. Perm.	K-8 All Subjects; 9-12 Psych., Social Science
75-07-23-00(M)	Bowman, Deborah	Elem. Cont.	K-8 All Subjects; 9 Dance; K-12 Ment. Hand.
75-08-11-00	Cunningham, Craig	Sec. Prov. 81	7-8 All Subjects; 9-12 Math, Health, P.E., & Recreation
75-08-12-00	Reid, Linda	Elem. Perm.	K-8 All Subjects; 9 Lang. Arts, Soc. Sci.; K-12 Ment. Hand.
75-08-15-00(M)	Clay, Margaret	Sec. Perm.	7-8 All Subjects; 9-12 Music, English, Social Science
75-08-29-00	Gibowski, James	Sec. Prov. 81	7-8 All Subjects; 9-12 English, Journalism
75-10-14-00	Drews, Phyllis	Elem. Cont.	K-8 All Subjects; K-12 Ment. Hand., Emot. Disturbed
75-12-31-00	Piotrowski, Cheryl	Elem. Prov. 81	K-8 All Subjects; 9 English; K-12 Education of Deaf

76-01-13-00	Brzezinski, Deborah	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci., Phys. Educ.
76-01-18-00	Alam, Geraldine	Sec. Perm.	7-8 All Subjects; 9-12 English, Soc. Sci., Speech
76-06-23-00	Herbert, Edward Jr.	Sec. Cont. Full Voc.	7-8 All Subjects; K-12 P.E.; 9-12 English, Bus. Educ.; Voc. Dist. Ed.; Dist. Education
77-02-23-00	Sheffer, Janine	Elem. Prov. 83	K-8 All Subjects; 9 Fine Arts; K-12 Educ. of Deaf
77-03-14-00	Anderson, Ruth Ann	Elem. Prov. 82	K-8 All Subjects; 9 Soc. Sci.; Early Childhood Specialty
77-06-16-00	Pieronski, Thomas	Elem. Prov.82	K-8 All Subjects; 9 Social Science, Psychology
77-08-16-00	Deeg, Sheryl	Sec. Prov. 82	7-8 All Subjects; 9-12 English, Social Science
77-08-19-01	Lee, Robin	Elem. Prov. 83	K-8 All Subjects; 9 Health; K-12 Orth. Hand., Teacher of the Homebound
77-08-19-02	Lake, Donna	Elem. Prov. 82	K-8 All Subjects; 9 English, K-12 Education of Deaf
77-08-30-01	Gaffney, Betty	School Social Worker	
77-08-30-02	Brattain, Steven	Sec. Prov. 81	7-8 All Subjects; 9-12 English: K-12 Music

77-08-30-03	Bergstrom, Wendy	Elem. Prov. 82	K-8 All Subjects; K-12 Ment. Handicapped
77-09-01-00	Basel, Bonita	Sec. Prov. 82 Temp. Voc. 82	7-8 All Subjects; 9-12 Art, Voc. Home Econ.; K-12 Home Ec.; Consumers & Homemaking
77-09-07-00	Holda, Michelle	Elem. Prov. 81	K-8 All Subjects; 9 Fine Arts, Social Science, Lang. Arts
77-09-08-01	Diebold, Susan	Elem. Perm.	K-8 All Subjects
77-09-08-02	Csage, Florence	Elem. Perm.	K-8 All Subjects
77-09-08-03	Lambick, Laura	Elem. Prov. 83	K-8 All Subjects
77-09-09-01	Mohney, Kathleen	Elem. Perm.	K-8 All Subjects; 9 Math, Art
77-09-09-02	Zaski, Cheryl	Elem. Cont.	K-8 All Subjects; 9 Math
77-09-12-00(M)	Ray, Uanita	Elem. Prov.81	K-8 All Subjects; 9 Art, Social Science
77-09-20-00	West, John	Voc. Cert.	Painting & Decorating
77-09-24-00(M)	Hirschman, Betty	Elem. Prov. 82	K-8 All Subjects; 9 Fine Arts, Social Science
77-09-26-00(M)	Cason, Doris	Elem. Perm.	K-8 All Subjects
77-10-08-00	Hammersley, Carolyn	Sec. Perm.	7-8 All Subjects; 9-12 English, Speech, K-12 Music

77-11-18-00(M)	Morales, Ruby	Elem. Prov. 81	K-8 All Subjects; 9 Soc. Sci.
78-02-06-01	May, Sveri	Elem. Prov. 82	K-8 All Subjects; 9 English; K-12 Ment. Hand.
78-02-06-02	Burnette, Cheryl	Sec. Prov. 82	7-8 All Subjects; 9-12 Soc. Sci.
78-02-20-00(M)	Pigott, Willye	Elem. Prov. 81	K-8 All Subjects; 9 Bus. Ed., Soc. Sci.; K-12 Reading
78-02-26-00(M)	Robinson, Linda	Elem. Prov. 84	K-8 All Subjects; 9 Soc. Sci.
78-08-19-00	Brown, Philip	Elem. Prov. 85	K-8 All Subjects; 9 Soc. Sci., Fine Arts; School Social Worker
78-08-22-00	Hutchings, Sheryl	Elem. Perm.	K-8 All Subjects; K-12 Emotionally Impaired
78-08-30-00	Donley, Barbara	Sec. Cont.	7-8 All Subjects; 9-12 Biology, Library Science
78-09-01-00	Waite, Victoria	Elem. Cont.	K-8 All Subjects; 9 Soc. Sci.; K-12 Emotionally Disturbed, Learning Disabled
78-10-05-00(M)	Hicks, Annie	Elem. Prov. 83	K-8 All Subjects; 9 English, Soc. Sci.
78-10-11-00	Pressel, Susan	Elem. Cont.	K-8 All Subjects; 9 Lang. Arts

78-10-19-00	Rademacher, Lenore	Sec. Cont.	7-8 All Subjects; 9-12 Bus. Ed., Econ., Voc. Bus. Educ., Voc. Distributive Education
		Temp. Voc. 82	Gen. Off. Cler., Steno & Secre., Typing & Related Occup., Clerical & Secretarial Lab.
78-10-23-01	Smith, Karen	Elem. Prov. 81	K-8 All Subjects; 9 English, Health
78-10-23-02(M)	Wade, Gwendolyn	Elem. Prov. 83	K-8 All Subjects; 9 Fine Arts
78-10-25-00	Wygant, Wendy	Elem. Prov. 81	K-8 All Subjects; 9 Soc. Sci.; K-12 Art
78-10-29-00	Arndt, Beverly	Elem. Prov. 81	K-8 All Subjects; K-12 Speech Correction
78-12-11-01(M)	Williams, Marilyn	Elem. Prov. 83	K-8 All Subjects; 9 Lang. Arts
78-12-11-02(M)	Blakely, O. Pearl	Elem. Prov. 84	K-8 All Subjects; 9 Lang. Arts, Phys. Educ.
79-01-11-00	Moulton, Cynthia	Elem. Prov. 83	K-8 All Subjects; 9 Soc. Sci.; K-12 Ment. Hand.; Early Childhood Specialty
79-02-16-00(M)	Cousin, Yvonne	Elem. Prov. 84	K-8 All Subjects; 9 Speech; K-12 Ment. Handicapped
79-06-14-00	Stobie, Thomas	Elem. Cont.	K-8 All Subjects; 9 Speech; K-12 Ment. Hand.

79-07-18-00	(M) Muniz, Albert	Sec. Cont.	7-8 All Subjects; 9-12 Spanish, English
79-08-18-00	(M) Davis, Kathy	Sec. Prov. 83	7-8 All Subjects; 9-12 Speech, English
79-08-21-00	Johnson, Rashell	Sec. Prov. 85	7-8 All Subjects; 9-12 Psych., Home Econ., Voc. Home Econ.
79-08-28-00	Tomsovic, Sharon	Elem. Prov. 85	K-8 All Subjects; K-12 Learning Disabled, Emotionally Impaired, Mentally Hand.
79-08-30-0	Strohl, Jay	Elem. Cont.	K-8 All Subjects; 9-12 English; K-12 Music
79-08-31-01	Gibbs, Stanley	Sec. Prov. 84	7-8 All Subjects; 9-12 Biology, Phys. Educ., Psychology
79-08-31-02	Shoaff, Robert	Sec. Prov. 84	7-8 All Subjects; 9-12 Chemistry; K-12 Phys. Education
79-08-31-03	(M) Brown, Larry	Sec. Prov. 84	7-8 All Subjects; 9-12 Biology; K-12 Phys. Education
79-08-31-04	Snyder, Claudia	Elem. Prov. 83	K-8 All Subjects; 9 Soc. Sci., Spanish
79-09-03-00	Cox, Sandra	Elem. Prov. 85	K-8 All Subjects; K-12 Learning Disabled, Emotionally Disturbed, Mentally Handicapped

79-09-04-01	Wilson, Douglas	Elem. Prov. 84	K-8 All Subjects; K-12 Phys. Impaired
79-09-04-02	Rasmussen, Julie	Sec. Prov. 85	7-8 All Subjects; 9-12 Voc. Home Ec.; K-12 Home Econ.
79-09-06-00	Gamin, James	Sec. Prov. 83	7-8 All Subjects; 9-12 Psych.; K-12 Phys. Educ.
80-01-14-00	Alger, Joseph	Sec. Prov. 84	7-8 All Subjects; 9-12 History, K-12 Physical Education
80-01-28-00	Harper, Sharon	Elem. Perm.	K-8 All Subjects
80-02-29-00	(M) Gates, Austin	Sec. Prov. 81	7-8 All Subjects; 9-12 Science, Soc. Sci.; K-12 Phys. Educ.
80-04-04-00	Korth, Charlene	Sec. Perm.	7-8 All Subjects; 9-12 Home Econ., Soc. Sci.; K-12 Mentally Handicapped
80-05-06-00	Winzeler, Barbara	Elem. Prov. 83	K-8 All Subjects; 9 Soc. Sci.
80-08-07-00	Moore, Paula	Elem. Cont.	K-8 All Subjects; K-12 Speech Corr., Educ. of Deaf
80-08-27-00	Rios, Lyn	Sec. Prov. 84	7-8 All Subjects; K-12 Music
80-09-08-00	Ratchford, Thomas	Sec. Prov. 86	7-8 All Subjects; 9-12 Math, Business Administration
80-09-10-00	Beson, Kevin	Sec. Prov. 86	7-8 All Subjects; K-12 Music

80-10-03-00	McDonald, Mary Ellen	Sec. Prov. 85 Temp. Voc. 85	7-8 All Subjects; 9-12 Dist. Educ., Recreation; Voc. Dist. Education
80-11-14-00	McCluskey, Beverly	Sec. Perm.	7-8 All Subjects; 9-12 Bus. Educ., English, Economics; 7-12 Guidance Counselor
81-01-05-01	Fenech, Marilyn	Elem. Prov. 85	K-8 All Subjects; 9 Soc. Sci.; Early Childhood Specialty
81-01-05-02(M)	Lim, Donna	Elem. Prov. 86	K-8 All Subjects; 9 Science
81-02-17-00(M)	Pitts, Shirley	Sec. Perm.	7-8 All Subjects; 9-12 English, Latin, Social Science

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Civil Action File No. 81-60156

WENDY WAGANT, et al.,

Plaintiffs,

vs.

JACKSON BOARD OF EDUCATION, et al.,

Defendants.

AFFIDAVIT RE INTERPRETATION
RE SENIORITY LIST

(Filed June 14, 1982)

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

Thomas Rasmusson, being first duly sworn, deposes and says that:

The Seniority List of the Jackson School District teachers heretofore furnished the Court sets forth the year-of-hire in the first two digits appearing before each teacher's name.

Further, deponent says not.

/s/ Thomas Rasmusson (P19242)
Co-Counsel for Plaintiffs
501 S. Capitol Avenue, #305
Lansing, MI 48933

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

On this 10 day of June, 1982, personally appeared before me, a Notary Public, in and for said county and state, the above-named, Thomas Rasmusson, who acknowledged that he has read the foregoing by him sucscribed, and knows the contents thereof, and that the same is true of his own knowledge except those matters therein stated on information and belief, and as to those matters he believes them to be true.

/s/ Shirley Ann Womack, Notary Public,
Clinton County, MI, acting in
Ingham County, MI
My Commission Expires: 10-17-83

JACKSON PUBLIC SCHOOLS

Year	Minority Students	Total Student Population	Minority Percentage
1973-74	2,292	12,531	18.3
1974-75	2,314	12,142	19.1
1975-76	2,338	11,792	19.8
1976-77	2,296	11,126	20.6
1977-78	2,283	10,576	21.6
1978-79	2,493	9,998	24.9
1979-80	2,509	9,717	25.8
1980-81	2,422	9,163	26.4
1981-82	2,286	8,724	26.2
1982-83	2,292	8,321	27.5

JACKSON PUBLIC SCHOOLS

Ethnic Count Students

Year	American Indian	Black	Asian	Hispanic	Vietnamese	White	Total
1970-71	7	2,016	19	157	0	11,393	13,586
1971-72	11	1,956	28	162	0	11,368	13,525
1972-73	8	2,066	32	166	0	10,796	13,068
1973-74	18	2,070	39	165	0	10,239	12,531
1974-75	21	2,091	34	168	0	9,828	12,142
1975-76	56	2,052	43	185	2	9,454	11,792
1976-77	27	2,044	42	175	8	8,830	11,126
1977-78	19	2,031	59	174	0	8,293	10,576
1978-79	268	1,976	79	170	0	7,496	9,998
1979-80	282	1,934	74	219	0	7,208	9,717
1980-81	256	1,852	112	203	0	6,740	9,163
1981-82	138	1,834	110	204	0	6,438	8,724
1982-83	144	1,862	96	190	0	6,029	8,321

December 17, 1982

M E M O R A N D U M

TO: William Pearson
FROM: Bruce Ambs
SUBJECT: Minority Staffing for Coaching Positions

Attached are listings of minority staff in coaching positions in Jackson Public Schools in 1981-82 and 1982-83.

Because some individuals are in more than one coaching assignment, the percentage figures below reflect minority staff in coaching positions by three different measures.

I. Percentage of minority staff in coaching assignments.

1981-82	1982-83
19.4%	31.3%

II. Percentage of coaching positions filled by minority staff.

1981-82	1982-83
18.3%	29.3%

III. Percentage of supplementary salaries for coaching paid to minority staff.

1981-82	1982-83
19.0%	29.7%

Three coaching positions for 1982-83 at Parkside Junior High are not yet filled.

The percentage of student population who are minority is 27.5 for 1982-83.

BJA/jp

JACKSON PUBLIC SCHOOLS
1400 W. Monroe Street
Jackson, Michigan 49202
Phone 517-789-8144

4/6/83

Teacher Aides

Year	Total Teacher Aides	Minority Teacher Aides	Minority Percent
1973-74	112	17	15.1
1974-75	105	20	19.0
1975-76	109	21	19.2
1976-77	46	7	15.2
1977-78	64	12	18.7
1978-79	63	13	20.6
1979-80	79	24	30.4
1980-81	53	15	28.3
1981-82	53	16	30.1
1982-83	54	16	29.6

4/6/83

Administrators

Year	Total Administrators	Minority Administrators	Minority Percent
1973-74	63	7	11.1
1974-75	55	8	14.9
1975-76	56	10	17.9
1976-77	49	7	14.3
1977-78	49	10	20.4
1978-79	52	10	19.2
1979-80	50	9	18.0
1980-81	48	8	16.7
1981-82	46	9	19.6
1982-83	41	10	24.4

4/6/83

Teachers

Year	Minority Percent	American Indian	Black	Asian	Spanish	White
1973-74	11.2	2	62	0	0	511
1974-75	11.4	2	62	1	0	506
1975-76	10.8	1	59	1	0	506
1976-77	10.3	2	51	1	1	469
1977-78	10.9	2	55	1	1	481
1978-79	12.3	2	59	1	1	450
1979-80	12.9	4	56	1	5	444
1980-81	13.4	4	55	2	4	421
1981-82	13.5	4	50	1	5	386
1982-83	13.9	4	48	0	4	348

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No. 84-1340

In The
Supreme Court of the United States
October Term, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President; and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Does the Constitution permit a public employer to adopt racial preferences for school teacher layoffs in the absence of judicial or administrative findings of past discrimination in employment or education based solely upon differences between the respective percentages of minority teachers and students?

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The opinion of which review is sought, reproduced at pages 2-19a of the appendix to the petition for certiorari, is reported as *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984). The district court opinion, reported at 546 F. Supp. 1195 (E.D. Mich. 1982), is included in the appendix to the petition at pages 20-36a.

JURISDICTION

The Sixth Circuit Court of Appeals entered judgment against Petitioners on October 25, 1984. By order of this Court, entered by Justice Sandra Day O'Connor on January 7, 1985, the time for filing the petition for certiorari was extended to and including February 22, 1985. The petition was docketed on February 21, 1985, and this Court granted certiorari on April 15, 1985.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based upon the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The principal statutory provision involved, 42 U.S.C. § 1983 (1978), provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. Facts and Background

This is a constitutional challenge to racial preferences adopted by the Respondents, the Jackson Board of Education, and a teachers' union which resulted in the layoff of Petitioners from their jobs as public school teachers. [App. 24a.] Since 1981, Petitioners *Wygant, et al.* have been laid off numerous times. [Pet. L. 3-26.] It is undisputed that Petitioners, tenured teachers, have repeatedly been displaced by less-senior minority teachers because of the racial preferences for layoffs in Respondent's labor contract. [App. 24a.]

The racial preferences [J.A. 8-17] were first adopted in the 1972-73 labor contract between Respondent Jackson Board of Education and the Jackson Education Association. [App. 22a.][1] For the past thirteen years, the racial preferences have been renewed without change in successive labor contracts. They continue in effect in the current contract, which operates until 1988. [J.A. 8.]

Specifically, Article XII.B.1 creates an exception to the otherwise applicable rule of seniority based layoffs (last-hired, first-fired), to the effect that non-minority teachers with greater seniority shall be laid off when necessary to preserve the existing percentage of minority teachers in the Jackson School District. [App. 32a.] The most pertinent provision of the contract is as follows:

> *ARTICLE XII.B.1.* In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with

[1]App. refers to the appendix to the petition for certiorari. The notation J.A. refers to the Joint Appendix followed by the page number. The notation Pet. L. refers to the Petitioners' Lodging of certain public documents with the Court.

> the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified *maintaining the above minority balance.*
>
> *Teachers who are on layoff will not accrue seniority in the district.* Seniority is defined as the length of service of a teacher since the acceptance date of his last letter of appointment for hiring.

[J.A. 13.] (Emphasis added.)

Until the percentage of minority teachers in the faculty (currently 16%) equals the percentage of minorities in the student body (currently 30%), the contract prohibits reduction of the percentage of minority teachers through seniority layoffs. Minority teachers who would otherwise be laid off have therefore been retained at the Petitioners' expense. [App. 24a.]

These differences between the respective percentages of minority teachers and students are not the result of discrimination in teacher employment or education, but are due in large part to the constantly changing racial demographics of the student population.[2] Although racial/ethnic data were not collected until the 1968-69 school year [J.A. 35], the data for subsequent years shows that the relative percentages of minority students has steadily

[2]Table A, attached, shows that while the number of minority students has remained fairly constant over the years, the number of white students has declined from 11,379 in 1970-71 to 5,425 in 1984-85. (Table A.) This trend has caused the relative percentages of minority students to rise from 16.2% in 1970-71 to 26.4% in 1980-81. By the 1984-85 school year, the minority student population had increased to 30%. *(Id.)*

increased over the years because of declining white student enrollment. [Table A.]

There are no administrative or judicial findings of past discrimination in teacher employment (or education) in the Jackson School District. [J.A. 30-53.] The complaint specifically asserts the lack of such findings, and the Jackson School Board's motion for summary judgment accepts these allegations as true.[3]

The record includes prior judicial findings by a federal district court that rejected contentions that the Jackson School Board has discriminated in the employment of minority teachers. *Jackson Education Association, Inc. v. Board of Education of Jackson Public Schools,* No. 4-72340 (E.D. Mich. Dec. 15, 1976). [App. 36-45a.] In 1974, the teachers' union and minority teachers filed suit because of the Jackson School Board's refusal to apply the minority layoff preferences in the contract. If the Board had applied the layoff preference for minority teachers, it would have resulted in the layoff of experienced tenured teachers and the retention of eleven probationary minority teachers. [J.A. 32.] The Board instead applied strict seniority, contrary to the express language of Article 12.B.1 [J.A. 43.]

The Plaintiffs in *Jackson Education Association* alleged that, prior to the execution of the 1972-73 labor contract, the School Board's employment practices had "the effect of discriminating against the employment of minority groups; . . ." The Jackson School Board successfully contested these allegations. [App. 37a.]

Following a trial on the merits, the federal district court summarized the evidence presented as follows:

[3]Paragraph 21 of the complaint alleges that: "There has been no finding of past employer discrimination in the hiring of teacher personnel on the part of the Jackson School Board, by a governmental agency competent to rule on such matters."

> In support of their allegations that defendant engaged in employment practices, prior to the making of the 1972 collective bargaining contract, that resulted in hiring policies discriminatory to minority personnel, . . . Plaintiffs submitted Exhibits 14 and 15. Exhibit 14, supplied by the Board, merely sets forth the student racial mix and the number of minority teachers contained in the total teaching faculty. [Footnote omitted.] The evidence further demonstrated that the first black teacher in the City of Jackson was not hired until 1953. Following the 1968-69 academic year, the Board attempted to increase the percentage of minority teachers, causing the minority staff ratio to increase from 3.9% to 8.8% over the next three years. . . .

[App. 41-42a.]

Based on the above evidence, the district court concluded, *sua sponte,* that it lacked subject matter jurisdiction because there was no constitutional violation of the Plaintiffs' rights as regards teacher employment in the Jackson School District.[4] Relying upon *Washington v. Davis,* 426 U.S. 229 (1976) (proof of racially discriminatory purpose is necessary for establishing a constitutional violation of the Equal Protection clause), the district court found that the "*de facto* imbalance" shown by the statistical data was insufficient to show discrimination in teacher employment as a matter of law. [App. 43a.] The court dismissed the complaint without ruling on the Plaintiffs' pendent state law claim for breach of contract.

The same Plaintiffs, again alleging breach of the contract provision requiring minority layoff preferences, brought suit in the Jackson County Circuit Court. [J.A. 39-53.] The Respondents argued that the retention of

[4]The Court lacked jurisdiction over Plaintiffs' Title VII claim because they failed to exhaust administrative remedies with the Equal Employment Opportunity Commission as required by 42 U.S.C. § 2000e-5. (App. 43a.)

minority probationary teachers at the expense of tenured personnel would have violated the Michigan Teacher Tenure Act, and "the Civil Rights Act of 1964 . . . in that it sets up a racial quota or racial goal and such are necessarily discriminatory." [J.A. 43, 47.]

The Jackson County Circuit Court disagreed. Based upon the same record as was before the federal court in *Jackson Education Association,* the county circuit court concluded:

> It has not been established that the Board had discriminated against minorities in its hiring practices. The minority representation of the faculty was the result of societal racial discrimination.

[J.A. 43.] Then, applying this Court's decision in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), the county circuit court held that the affirmative action provisions of the labor contract were a permissible solution to "societal discrimination." [J.A. 52.] As a result, the Jackson School Board has subsequently adhered to the minority preferences required by the contract. [App. 24a.]

The history of the adoption of the minority preferences can be briefly summarized. In November 1971, one of the School Board's administrators recommended to the racial subcommittee of the school's advisory council that increased recruitment of minority teachers be coupled with protection from layoffs.[5] [J.A. 41.] At the

[5]As shown in Table C, attached, the percentage of minority teachers employed in the school year prior to the adoption of the racial preferences, 1971-72, was 8.8%. This exceeded the 7.8% availability of minority teachers statewide as shown by the 1970 U.S. Census by Occupation, Michigan Table 54. By the time the racial preferences were adopted in the 1972-73 contract, the percentage of minority teachers in the district had increased to 10.1%. (Pet. L. 57-63).

time, the labor contract between the Jackson Education Association (JEA) and the Board of Education required layoffs on a straight seniority basis. [App. 21a.]

The vast majority of the teachers were opposed to racial preferences for layoffs.[6] In the spring of 1972, representatives of the teachers and the School Board negotiated the minority layoff preferences in the 1972-73 contract.[7] The teachers refused to ratify the contract, but returned to work for the beginning of the 1972-73 school year. The unratified contract resulted in a strike. [App. 22a.] In late fall, the teachers ended the strike and ratified the 1972-73 contract. [App. 22a.]

B. Decisions Below

Petitioners were laid off in April 1981 pursuant to the racial preferences in the contract [App. 24a], and have subsequently been laid off numerous times between 1981-1984. [Pet. L. 3-26.] Petitioners brought suit in federal district court in September 1981, invoking jurisdiction based on *inter alia,* 42 U.S.C. § 1983. Although seven of the eight Petitioners have since been restored to teaching positions, all have outstanding claims for backpay and seniority lost while on layoff. [App. 3a.]

[6]In January 1972, the Minority Affairs Office of the Jackson Public Schools surveyed the views of the teachers on the seniority layoff policy. Ninety-six (96) percent of the teachers were in favor of the seniority layoff system and were against preferences for minority teachers. [App. 22a.]

[7]The school board and the union were presumably aware of the racial tensions and violence that occurred in February 1972 in Jackson High School, one of twenty-two schools in the district. This may have been a consideration in the adoption of the racial preferences. [App. 22a.]

The district court decided the case on cross-motions for summary judgment. Applying *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), the court determined at the outset that judicial findings of past discrimination were unnecessary to sustain voluntarily adopted racial classifications that discriminate against non-minority employees. [App. 27a.]

Although the percentage of minority faculty in the district in the years preceding the layoffs at issue equaled or exceeded relevant labor market availability figures, the district court rejected this comparison.[8] The court instead compared the minority faculty population with the minority student population. Citing as its sole authority the case of *Oliver v. Kalamazoo Board of Education,* 498 F. Supp. 732 (E.D. Mich. 1980), *rev'd,* 706 F.2d 757 (6th Cir. 1983), the district court concluded that this comparison was proper because "[t]eachers are role-models for their students." [App. 29a.] Based on the percentage differences between the minority faculty and student populations,[9] the court held that minority underrepresentation was "substantial and chronic" and justified adoption of the racial preferences. [App. 31a.] Finally, the district court, analyzing the racial preferences under a four-part "reasonableness" standard [App. 31-33a], pronounced them constitutional. [App. 32a.]

[8]Table B, attached, illustrates the relevant labor indicators of the percentage of qualified minority teachers in the State of Michigan compared to the percentage of minority teachers employed in the district for the 1979-80 school year.

[9]Discrepancies between the percentages of minority teachers set forth in Table C and the same data in the Joint Appendix at 108 are explained by the fact that the Joint Appendix figures are based on the total number of teachers on the school district's seniority list before layoffs. The percentages listed in Table C are based on the actual numbers of teachers who taught during the school year as a result of layoffs in spring and recalls in the fall. The percentages of minority teachers in Table C are therefore slightly higher because they reflect operation of the minority layoff preference.

The Sixth Circuit affirmed, adopting both the result and reasoning of the district court, adding only the promotion of racial harmony in the community as a supporting rationale. [App. 4-11a.] Nor did the Sixth Circuit consider that its own rejection of the "role model" rationale in *Oliver,* 706 F.2d at 762-763, required reversal here. According to the Sixth Circuit, *Oliver* overturned a judicially mandated layoff quota that nullified the contractual seniority rights of white teachers in the name of the constitutional rights of the students. Conversely, the Sixth Circuit said that this case deals with what a school board and teacher's union may, but need not do, to cure "the past racial isolation of black teachers in the school system concerned." [App. 11a.][10]

SUMMARY OF ARGUMENT

The Respondents' explicit use of race for determining job rights is based on improper racial comparisons, has no remedial purpose, and violates the Petitioners' rights to Equal Protection of the laws under the Fourteenth Amendment.

This Court has never approved the explicit use of race as a "remedy" in the absence of "judicial, administrative or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick,* 448 U.S. 448, 497 (1980)

[10]The term "racial isolation" typically refers to segregation of an existing student body or teacher corps. It is inapposite here since each school in the district has a completely integrated faculty and student population. (See Sixth Circuit Joint Appendix at pp. 15-34).

(Powell, J., concurring). The Respondents' adoption of the racial preferences in the 1972-1973 labor contract was not designed or intended to remedy identified discrimination: rather, the racial preference was designed to protect minority teachers from layoffs for the stated purpose of achieving "parity" between the percentages of minorities in the teacher staff and the percentages of minorities in the student body.

The courts below sustained the use of race for this purpose and relied on this comparison between the minority student and teacher populations. [App. 29a] However, such an approach was disapproved by this Court in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), wherein the Court held, in the context of teacher employment, that the proper comparison is between the racial composition of the teaching staff and that of the qualified public school teacher population in the relevant labor market. Here, had the school district made layoffs in 1981 without regard to race, minority teachers would have comprised 11% of the total teaching staff for the 1981-1982 school year. This 11% figure approximates the relevant labor market indicators based on the 1980 Census. [Table B.]

Thus, the Sixth Circuit erred as a matter of law in finding "substantial" and "chronic" underrepresentation of minority teachers based upon mere percentage differences between the minority faculty and minority student populations. It compounded this error by relying upon stale data. The courts below compared student/teacher minority representation *prior* to the adoption of the racial preferences in 1972-1973, whereas most of the layoffs at

issue here occurred in or *after* 1981. In the interim, the percentage of minority teachers employed in the Jackson School District reached and exceeded relevant market indicators. [Tables B & C.]

Nor can the Respondents' use of race be justified by reference to the education specific theory that proportional representation of minority teachers and students is necessary to provide sufficient numbers of role models for minority students. As important as race-conscious *remedies* have been in school desegregation cases, this Court has never defined nor endorsed them in preferential terms. Thus, even in the context of dismantling a segregated school system, students do not have a constitutional right to attend a school with a teaching staff of any particular racial composition.

But the case before the Court is not a school desegregation case, where the rights of innocent third parties may have to give way to the necessity of dismantling a segregated school system and eliminating its invidious effects upon the educational experiences of minority students. There is no violation of student rights in the Jackson School District, which has been completely integrated for years. Here, there are no legitimate competing interests to be balanced. Petitioners' constitutional rights to be treated as individuals are at stake, and there is no identified injury that must be remedied at their expense.

Because there is no discrimination in employment or education, the role model rationale invoked below must stand or fall on its own merits or lack thereof. Significantly, Respondents did not offer any evidence to support the use of race on this basis, and the courts below accepted it without legal or evidentiary support. While

this theory might withstand scrutiny under a rational basis test, it cannot justify the preferential use of race as an occupational qualification.

Finally, while calling the use of race "temporary," the courts below sustained a racial preference which has been in effect unchanged for thirteen years and will operate for at least another three years. Given the constantly changing percentages of minority students and faculty, the preferences will likely continue in perpetuity. [Table A.]

For these reasons, the judgment below must be reversed.

ARGUMENT

I. THE FOURTEENTH AMENDMENT FORBIDS THE ADOPTION OF EXPLICIT RACIAL CLASSIFICATIONS BY A STATE OR LOCAL GOVERNMENT UNLESS SUCH CLASSIFICATIONS ARE INTENDED TO REMEDY PAST DISCRIMINATION AND ARE CAREFULLY TAILORED TO ACHIEVE THAT PURPOSE.

The racial classifications adopted by the Jackson Board of Education are unconstitutional because there are no judicial or administrative findings of discrimination in teacher employment and the record below does not and cannot support any such finding. In the absence of discrimination, an attempt to protect minority teachers from layoffs cannot meet the requirement that a remedy be narrowly tailored in response to identified injury. Without findings of discrimination, there is no state interest to support the use of race. As put by the court in *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir. 1981):

> Because the justification for race-conscious affirmative action is remedying the effects of past discrimination, a predicate for the remedy is that qualified persons make findings of past discrimination before the plan is implemented. Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action.

No Justice of this Court has ever suggested that such preferences were tolerable in the absence of a purpose to remedy past discrimination. Indeed, "[T]his Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring) (hereafter *Fullilove*).

By sustaining the explicit racial preferences in the Respondents' labor contract, the Sixth Circuit expands the power of state and local governments to use racial classifications beyond the permissible boundaries of the Equal Protection clause and the remedial parameters of Title VII. Unless this Court reverses the ruling below, state and local governments throughout the nation will be able to impose racial preferences without regard to whether the use of race has a remedial purpose and responds to appropriate findings of past discrimination.

A. Mere Differences Between The Respective Percentages Of Minority Teachers And Minority Students Is An Improper Basis For Finding Discrimination In Teacher Employment.

The court below purported to make the necessary findings of past discrimination by carving out an unprecedented exception in the context of teacher employment,

allowing racial preferences to be sustained upon a mere showing of statistical differences between the percentages of minority student and faculty populations.[11] "[I]n the setting of this case," the district court concluded, "it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. [App. 29a.]

The courts below rationalized the rejection of relevant labor market figures, which gave meaning to the concept of minority underrepresentation in *United Steelworkers of America v. Weber,* 443 U.S. 193, 212 (1979), by referring to the education-specific theory that "teaching is more than just a job. . . . More specifically, minority teachers are role models for minority students." [App. 29a.]

The Sixth Circuit's refusal to consider the relevant labor market in determining the existence of alleged discrimination is an approach disapproved by this Court in the very context of teacher employment. In *Hazelwood School District v. United States,* 433 U.S. 299, 308 n.13 (1977), this Court warned that: "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Comparisons to the student body, as opposed to the general population, have *even less* probative value.[12]

In *Hazelwood,* this Court specifically considered the question of how to define the relevant labor pool. The

[11]App. 8a.

[12]See e.g., *Fort Bend I. Sch. Dist. v. City of Stafford,* 651 F.2d 1133, 1138 (5th Cir. 1981); *Castaneda v. Partida,* 648 F.2d 989, 1002 (5th Cir. 1981).

case involved allegations that a school district had engaged in a pattern and practice of employment discrimination in the hiring of teachers. This Court rejected the district court's comparison of the racial composition of the district's teacher work force and the student population, and held that such an approach, "fundamentally misconceived the role of statistics in employment discrimination cases." *Hazelwood,* 433 U.S. at 308. Instead, this Court held that the proper comparison in a case involving alleged employment discrimination of school teachers was "[b]etween the racial composition of [the district's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."[13] *Hazelwood,* 433 U.S. at 308.

Had the courts below utilized the *Hazelwood* method for determining what an ideal number of minority teachers would be in a discrimination-free hiring process, they would have readily concluded that minority teachers have been substantially overrepresented in the Jackson School District for several years.[14]

The Sixth Circuit's use of teacher-student comparisons is a clear error of law. In *Weber,* this Court upheld preferential admissions to a craft-training program based on a

[13]Although relevant labor market figures were not presented by either party below, this Court can reverse because (1) the courts below based their decision on an improper comparison, and (2) the relevant labor market indicators have been provided to the Court and are subject to judicial notice.

[14]The relevant labor market indicators shown in Table B illustrate that in 1979-80, the percentage of minority teachers exceeded (1) the percentage of minorities in the general population surrounding the school district; (2) the percentage of qualified minority teachers working statewide; and (3) education degrees conferred on minorities by Michigan colleges and universities.

significant disparity of black craft workers as compared with the civilian labor force. In addition, this Court relied upon numerous judicial findings of discrimination and took judicial notice of the almost total exclusion of blacks from craft unions and the skilled trades. 443 U.S. at 198 n.1.

In its search for evidence of past discrimination in the instant case, the Sixth Circuit and the district court justified the finding of "substantial" and "chronic" underrepresentation [App. 31a] by sole reference to teacher/student comparisons as used in *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732 (W.D. Mich. 1980). (Hereafter *Oliver*.) [App. 29a.] In 1980, as part of a court-ordered desegregation remedy, the district court required a 20% quota for the hire and layoff of black teachers, based on the percentage of black students in the school district. In doing so, it nonetheless acknowledged the validity of the superintendent's testimony about the practicalities of hiring and retaining qualified minority teachers. He attributed the recent decline in the percentage of black staff in part to a higher attrition rate among black teachers leaving to take more lucrative jobs in private industry, and to promotions to administrative positions. *Oliver*, 498 F. Supp. at 738-739 n.4.

In an opinion that contradicts the decision below, a different panel of the Sixth Circuit overturned the district court's order in *Oliver*, holding that students do not have a right to a teaching staff of a particular racial composition. The appeals court further admonished the district court to take these "practicalities" into account when devising equitable redress. *Oliver*, 706 F.2d

at 762. There is no reason to believe that the "practicalities" are any different in the Jackson School District.[15]

The data presented to the district court in *Oliver* is also relevant to the instant case, since Kalamazoo is 64 miles from Jackson. This data shows that the Kalamazoo black teacher ratio exceeded most relevant labor market indicators:

> [I]n 1977-78 the District's percentage of Black teachers (11.6%) met, or exceeded, most of the chosen standards, such as: current Black applicant rate—11.7%; percent Black population of Kalamazoo County—5.5%; percent of education degrees conferred on Blacks by Michigan colleges and universities for 1975-76—10.0%; percent Black population in Michigan—9.7%; and percent Black in the United States—11.0%.

498 F. Supp. at 745. Based on these labor market figures, the Sixth Circuit held that the district court erred in approving "the institution of a 'system,' requiring both a hiring quota of 20% black and an ultimate overall teaching staff of 20% black." 706 F.2d at 762. Given the relevant labor market, and the fact that the 20% figure was adopted merely because it approximated the black student percentage at the time, the 20% quota was invalidated as "arbitrary." 706 F.2d at 762-763.

The result in *Oliver* should have occurred here.[16] As in *Oliver*, the Respondents have adopted a goal for racial

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[15]In view of the proximity between Jackson and Kalamazoo, it seems reasonable to conclude that the Kalamazoo and Jackson School Districts have been competing for the same limited pool of formally qualified black teachers. Since the district court here rejected relevant labor market comparisons, it disregarded the statewide availability figures for minority teachers as set forth in *Oliver v. Kalamazoo Board of Education*, 706 F.2d 732, 745 (W.D. Mich. 1980).

[16]The Sixth Circuit's inconsistency created two different results in two similar school districts in medium-size cities sixty-four miles apart. While *Oliver* involved the remedial powers of a federal court, both *Oliver* and the instant case are nonetheless governed by the Constitution's Equal Protection guarantees.

preferences that is erroneously based on the percentage of minority students in the district. Like *Oliver,* the percentage of minority students substantially exceeds the percentage of qualified minority teachers available in the relevant labor market. And, as in *Oliver,* the rigid quota disregards the practicalities of attracting and retaining qualified minority teachers.

Notwithstanding the striking similarities between the present case and *Oliver,* the Sixth Circuit distinguished *Oliver* on the theory that judicially ordered racial preferences are subject to stricter constitutional limitations than are quotas voluntarily adopted by other branches of government. The Sixth Circuit's claim that judicial remedies are subject to stricter constitutional standards is clearly erroneous. Otherwise, it would be permissible for state and local government to promulgate explicit racial classifications that would be judged according to a highly deferential "rational basis" test, and would be upheld so long as the racial classifications are considered "benign." This rationale repudiates the history of the Fourteenth Amendment and Congress's adoption of 42 U.S.C. § 1983 in order to constrain discriminatory state action.

The Sixth Circuit's reasonable basis standard is not conducive to rigorous analysis and enabled it to overlook the fact that its "finding" of discrimination was based on an improper comparison. The fact that the percentage of minority students is higher than the percentage of minority teachers provides no evidentiary basis to conclude that there is discrimination in the hiring of minority school teachers. Indeed, there are any number of reasons for differences between these two groups. The most obvious reason is that declining white student enrollment has caused the relative percentage of minority students to rise. [Table A.] At the same time, the relevant labor pool of qualified minority teachers has remained constant. (Over ten years, the minority teacher availability rate changed 2.2%, from 7.8% in 1970 to about 10% in 1980. *Supra* at p. 6, n.5) It is arbitrary and meaningless to adopt racial preferences based on achieving "parity" between these two groups.[17]

B. The "Reasonableness" Standard Of Review In The Sixth Circuit Does Not Ensure That The Use Of Race Conforms To The Guarantees Of Equal Protection Under The Fourteenth Amendment.

Application of the legally erroneous standard of reasonableness enabled the Sixth Circuit to find "substantial" and "chronic" underrepresentation based on an improper comparison. It compounded this error by selecting data that was compiled more than a decade ago. Specifically, the district court selected *only* those figures "*in the years preceding the adoption of the affirmative action plan.*" (Emphasis added.) [App. 9a.]

Obviously, the comparison used and the figures selected virtually dictated the result. Although this lawsuit was filed and challenged layoffs made in 1981, the

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[17]On this point, the Equal Employment Opportunity Commission instructs that the proper p[illegible]pose of an affirmative action program "*is to overcome pre[illegible]is exclusion,* rather than merely achieve numerical 'parity.'" EEOC, *Eliminating Discrimination In Employment: A Compelling National Priority* IIIX-X3 (1979) (emphasis in original). The Civil Rights Commission has also warned that race-balancing quotas improperly change "the objectives of affirmative action plans from dismantling discriminatory processes to assuring that various groups receive specified percentages of resources and opportunities." U.S. Commission on Civil Rights, *Affirmative Action In The 1980's: Dismantling The Process of Discrimination.* p. 31 (1981).

district court relied upon teacher/student comparisons for the years 1968 through 1972. Using these figures, the district court concluded

> Applying this standard, it is clear that minority teachers were 'substantially' and 'chronically' underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan. In 1953, there were no black teachers and by 1961, only 1.8 percent of the faculty was black. The Court has not been provided with figures establishing the percentage of black students in the Jackson School District during these years.
>
> However, by the school year 1968-69, black students made up 15.2 percent of the total student population, while black faculty members constituted only 3.9 percent of the total teaching staff. While the percentage of minority students remained relatively constant (15.9 percent in 1971), the percentage of minority faculty members increased, but only to 5.5 percent in 1970-71 and 8.3-8.8 percent in 1971-72. (Footnote omitted) These findings were made by the school board and the Court holds that the school board was competent to make such findings.

[App. 30a.]

Although this was the same evidence previously rejected as insufficient to show a *prima facie* case when presented to a federal district court in 1974-1976, *supra*, p. 5, the courts below erroneously concluded that these differences were the result of discrimination in teacher employment. The district court then purported to apply the four-part test of the joint opinion by Justices Brennan, White, Marshall, and Blackmun in *Regents of the University of California v. Bakke*, 438 U.S. 265, 324 (1978). (Hereafter *Bakke*.) The court then concluded that the racial preferences for teacher layoffs were "reasonable". [App. 31a.]:

> First, the plan is designed to either 1) retain a sufficient number of minority teachers so that the racial composition of the Jackson School District faculty will roughly approximate that of the student body, or 2) if that ratio has not yet been achieved, then at least to prevent a reduction in the minority to majority ratio.
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> * * *
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> Second, there is no suggestion that the affirmative action layoff provision is anything more than a temporary measure. [Citations omitted.] In fact, the layoff provisions are part of a collectively-bargained contract of limited duration. These provisions, presumably like all other provisions in the contract, are subject to change whenever the contract is renegotiated.
>
> Third, the layoff provisions do not require the retention of unqualified teachers. [Citation omitted.] A layoff provision, by definition, applies only to those previously hired and, presumably, previously found qualified.
>
> Fourth, the layoff provision does not require the layoff of all white teachers or otherwise unnecessarily or individously trammel their interests. [Citations omitted.]

[App. 32-33a.] This reasoning is faulty on all counts.[18]

First, the goal of achieving a numerically specified racial balance is itself constitutionally impermissible without a remedial purpose that responds to identified discrimination. As Justice Powell wrote in *Bakke*, 438 U.S. at 307, the goal of achieving "some specified percentage of a particular group merely because of its race or ethnic origin is not constitutionally permissible and constitutes discrimination for its own sake." This Court has emphasized that there is neither a constitutional necessity nor a right to create racial balances, *Milliken v. Bradley*,

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[18]There is no mention of "remedy" or "discrimination" in the above four part test applied by the Sixth Circuit.

418 U.S. 717, 740-741 (1974), and the goal of racial balancing as a remedy has been specifically rejected by the Court because "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971).

Second, the minority preferences for layoffs cannot be fairly characterized as "temporary" or of limited duration. The courts below, while calling the use of race "temporary," upheld a racial preference which has been in effect for thirteen years and will operate for at least another three years. Moreover, because the objective of the racial preferences is to achieve "parity" between the constantly changing percentages of minority students and faculty, most likely the preferences will continue in perpetuity. The number of minority students has remained the same but the number of non-minorities has decreased. Consequently, the goal of proportional representation between minority faculty and students is unrealistic. Such a goal contrasts sharply with *Weber,* in which preferential selection of craft trainees terminates as soon as the percentage of skilled minority craft-workers *approximates* the percentage of minorities in the civilian labor force. *Weber,* 443 U.S. at 209.

Third, the use of racial classifications to decide who keeps a job cannot be upheld merely because "the layoff provisions do not require the retention of unqualified teachers." [App. 32a.] Layoffs by race inherently disregard considerations of experience and merit. The Jackson School Board recognized this fact when it refused to apply the racial preferences and laid off probationary minority teachers in 1974, choosing to retain tenured white teachers. Apparently, the Board believed that the use of racial preferences to layoff more experienced white

teachers was not in the best interests of either black or white students.

Fourth, one cannot say that the use of race does not "unnecessarily or invidiously trammel" the interests of "white teachers." [App. 33a.] Petitioners, as "white teachers," were laid off and lost pay and seniority, despite their greater seniority over the retained minority teachers. This is a heavy burden to inflict because of race, especially in the absence of any limitations on the operation of the racial preferences, which puts Petitioners in constant jeopardy even after they are recalled. [Pet. L. pp. 3-26.]

In justifying the infliction of this burden upon a few "white teachers," the courts below cited *Fullilove v. Klutznick,* 448 U.S. 448, 484 (1980), (hereafter *Fullilove*), for the proposition that "an affirmative plan is not invalid merely because innocent persons bear the brunt of the racial preference." [App. 33a.] This selective citation to *Fullilove* ignores this Court's explicit warning that the burdens assigned to innocent third parties by such racial classifications are permissible only when "effectuating a limited and properly tailored remedy to cure the effects of prior discrimination . . ." *Fullilove,* 448 U.S. at 484.

The set aside program for minority contractors in *Fullilove* satisfied this requirement because it included procedural safeguards to insure that "the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process." *Fullilove,* 448 U.S. at 449. In contrast, the racial preferences in the instant case have no similar safeguards and, in fact, benefit non-disadvantaged minority teachers who are highly employable

even in a competitive job market.[19] In sustaining the preferences for minority teachers, the Sixth Circuit has effectively rejected Chief Justice Burger's warning against any "program which seeks to confer a preferred status upon a non-disadvantaged minority," *Fullilove,* 448 U.S. at 485, as well as the requirement that race-conscious affirmative action programs be carefully tailored so that they do not "stray from narrow remedial justifications." *Fullilove,* 448 U.S. at 487.

II. STRICT JUDICIAL SCRUTINY AUTHORIZES VOLUNTARY REMEDIES ONLY FOR IDENTIFIED DISCRIMINATION AND THEN ONLY WHEN THE REMEDY IS A CAREFULLY TAILORED RESPONSE TO APPROPRIATE FINDINGS OF DISCRIMINATION.

The prevailing standard of review in the Sixth Circuit departs from established constitutional principles. In *Bakke,* Justice Powell, announcing the judgment of the Court, articulated the traditional "strict scrutiny" standard of review applicable to all governmentally imposed racial classifications:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. * * * Racial and ethnic distinctions of any sort are inherently suspect and thus call for the exacting judicial examination.

Bakke, 438 U.S. at 289-91.

The Sixth Circuit has flatly rejected strict scrutiny, and has instead adopted a "reasonableness" standard, holding that

> One analysis is required when those for whose benefit the Constitution was amended . . . claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination.

Bratton v. City of Detroit, 704 F.2d 878, 886 (6th Cir. 1983).

The Sixth Circuit's erroneous view of the Fourteenth Amendment not only dictated the result in the instant case, but also discards the vital principle that "[i]f both are not accorded the same protection, then it is not equal." *Bakke,* 438 U.S. at 290 (opinion of Powell, J). The reasonableness test used by the Sixth Circuit also contradicts the heightened scrutiny employed by this Court in upholding Congress's set aside for minority contractors. Announcing the judgment of the Court in *Fullilove,* Chief Justice Burger, joined by Justices White and Powell, held that any "preferences based on racial or ethnic criteria must necessarily receive a most searching examination . . . ." 448 U.S. at 491. And Justices Stewart, Rehnquist, and Stevens articulated the traditional strict scrutiny standard in separate dissenting opinions. Id. at 526, 537. Dismissing *Fullilove* as a "plurality decision with little precedential value"[20] the Sixth Circuit has instead explicitly embraced (and purports to apply) the concurring

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[19]The Detroit School District, which is 80 miles from Jackson, hires more black teachers than white teachers. *See, Bradley v. Milliken,* 460 F.Supp. 299, 317 (E.D. Mich. 1978). In addition, both the Kalamazoo District (64 miles away) as well as the Flint School District (86 miles away) have affirmative action recruiting programs for minority teachers. *See, Oliver v. Kalamazoo Bd. of Education,* 706 F.2d 757, 762 (6th Cir. 1983); *Marsh v. Flint Bd. of Education,* 581 F. Supp. 614 (E.D. Mich. 1984). Given this competitive market for minority teachers, the Jackson School Board has exhausted the labor pool of qualified minority teachers in Michigan and has, since 1978, been recruiting minority teachers in the South. (J.A. 55).

[20]*Bratton v. City of Detroit,* 704 F.2d 878, 885 (6th Cir. 1983).

opinion of Justices Brennan, White, Marshall, and Blackmun in *Bakke*. [App. 7a.][21]

Justice Blackmun has observed "that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful." *Bakke*, 438 U.S. at 407. Thus, the operation of thousands of affirmative action programs across the nation must ultimately discriminate against non-minorities. Accordingly, racial classifications ostensibly designed for remedial purposes must be subjected to strict judicial scrutiny. When racial classifications impinge upon individual rights, the individual "is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke*, 438 U.S. at 299 (opinion of Powell, J.).

Because "this Court has never approved race-conscious remedies absent judicial, administrative or legislative findings of constitutional or statutory violations," *Fullilove*, 448 U.S. at 497 (Powell, J. concurring), Petitioners start with the proposition that only *identified* discrimination may rise to the level of a compelling state interest. *See*, *Fullilove*, 448 U.S. at 498. In employment discrimination cases, such findings must, at a minimum, be based on the relevant labor market for the particular job in question. *Hazelwood*, 433 U.S. at 308 n.13. Subsequent, to this Court's decision in *Hazelwood*, the lower courts have consistently held that the appropriate statistical comparison for purposes of identifying discrimination is the relevant labor market of qualified job applicants, as opposed to the general population. This analysis excludes those who are obviously disqualified from employment because of age or other disability, as well as those who do not have the requisite qualifications for the job.[22]

Moreover, disparities between an employer's work force and the relevant labor market must be *statistically significant*. *See*, *Castaneda v. Partida*, 430 U.S. 482 (1977). In the case of *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984), the court held that:

> Once the plaintiff's analysis has focused on the proper groups for comparison, it must yield results that meet generally accepted standards of statistical significance. In other words, both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination.

Therefore, appropriate findings of discrimination must include, at a minimum, statistically significant disparities based on probative comparisons sufficient to create an inference of discrimination. Moreover, the infer-

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[21]As discussed *supra* at 19-23, the Sixth Circuit has distorted almost beyond recognition the standard articulated in the joint opinion that there must be "a sound basis for concluding that minority underrepresentation is substantial and chronic and is impeding (equal) access of minorities . . . ." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 362 (1978) (joint opinion, Brennan, J.)

[22]See, e.g., *EEOC v. United Virginia Bank*, 615 F.2d 147 (4th Cir. 1980); *EEOC v. Local 14, International Union of Operating Engineers*, 553 F.2d 251 (2d Cir. 1977); *Vuyanich v. Republic National Bank*, 24 F.E.P. Cases 128 (N.D. Tex. 1980). For instance, in *Perham v. Ladd*, 436 F. Supp. 1101, 1106 (N.D. Ill. 1977), the district court rejected statistics that did not compare the relevant labor market:

> [T]he Plaintiff must, at the very least, make a comparison between the sexual composition of the teaching staff of Chicago State and the sexual composition of the qualified teacher and administrative population in the relevant labor market.

ence should also be supported by other evidence that indicates intentional discrimination. *Weber,* 443 U.S. at 198.[23]

When such findings are made by competent authority, the remedial use of race can then be "precisely tailored," *Bakke,* 438 U.S. at 299 (Powell, J.) to remedy *only* those differences between an employer's work force and the relevant labor market that could not have occurred by chance. Otherwise, affirmative action becomes nothing but a numbers game to grant preferences based on race.

Petitioners further submit that any constitutional standard of review for voluntary affirmative action must not repudiate the national policy as expressed in Title VII of the Civil Rights Act.[24] Therefore, when a bona fide seniority or merit system protected under Section 703(h) of Title VII is already in place, an employer should be prohibited from using race as a criteria for job selection, advancement or retention, regardless of any findings of prior discrimination. *See* e.g. *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576 (1984); *Franks v. Bowman Transportation Co.,* 424 U.S. 761 (1976).

If employers can distort bona fide seniority and merit systems by injecting racial factors, they will have no in-

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[23]Because the benefit in *Weber* was a training program, rather than a particular job requiring previously acquired skills, training, experience, or education, the probative comparison was therefore the entire civilian labor force. In addition to the statistically significant disparities presented in *Weber,* this Court took judicial notice of the history of intentional discrimination in traditionally segregated job categories of skilled trades and the exclusion of blacks from craft unions. *Weber,* 443 U.S. at 209.

[24]See, e.g., *Great American Savings & Loan Association v. Novotny,* 442 U.S. 366, 373 (1972), *Fitzpatrick v. Bitzer,* 427 U.S. 445, 447 (1976) (holding that the 1972 amendments to Title VII extending the act to the public sector was done pursuant to Congress's power to enforce the Fourteenth Amendment.)

centive to spend the money and resources necessary to ensure compliance with Title VII's requirement of non-discriminatory employment policies. Equal employment opportunity costs money, and it is far easier—and cheaper—for employers to buy their peace by caving in to demands for racial quotas. *See, Bushey v. New York State Civil Service Commission,* 53 U.S.L.W. 3477 (U.S. Jan. 8, 1985) (Rehnquist, J., joined by Chief Justice Burger and Justice White, dissenting from denial of certiorari).

If this country is ever to achieve true equal opportunity for all Americans, the policy of the law must provide employers with the proper incentives to comply with constitutional and statutory mandates of equal employment opportunity. But the courts below have facilitated the denial of equal employment opportunity by endorsing outright racial preferences. As long as employers are vulnerable to suits for failing to adopt racial preferences, they will not strive for non-discriminatory policies that protect all races.

This Court must therefore advance and protect the national policy of non-discrimination as expressed in the Fourteenth Amendment and Section 703(a)(2) of Title VII:

> It shall be an unlawful employment practice for an employer . . . (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-3(a)(2).

The remedial use of race therefore serves a compelling state interest only when unexplained statistical disparities using relevant comparisons are so profound as to

admit of no other explanation but discrimination and there is some other evidence of discrimination. Explanations of statistical disparities might include the impact of bona fide seniority and merit systems and other job related requirements, which should be applied regardless of past discrimination.[25]

When past discrimination is shown and current selection procedures are not bona fide, an employer may use race in selecting from the pool of qualified job applicants or employees provided that the means selected are "narrowly drawn" to achieve remedial purposes. *See, Fullilove*, 448 U.S. at 498 (Powell, J.).[26]

As applied to this case, the proper standard invalidates the result below as an unconstitutional denial of Equal Protection. First, there are no differences between the percentage of minority teachers employed as compared to the availability of minority teachers in the relevant labor market. Accordingly, the use of race achieves no remedial purpose and serves no state interest.

Second, since this a layoff case, one inquiry might be whether layoffs without regard to race would cause the percentage of minority teachers employed in the district

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[25]*N.A.A.C.P. v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974), ("For once an environment where merit can prevail exists, equality of access satisfies the demands of the Constitution.")

[26]This standard would validate *properly drawn* "voluntary" affirmative action plans administered by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) under Executive Order 11246. Also, the standard would not affect minority outreach recruitment programs. It would invalidate, however, the use of race to override merit and seniority systems that are "bona fide" within the meaning of Section 703(h) of Title VII, 42 U.S.C. § 2000(3), *et seq. See, Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

to drop below relevant labor market indicators. Such is not the case here.[27]

But even if layoffs had reduced the percentage of minority teachers employed below acceptable levels, as shown by relevant labor market statistics, an employer should not be permitted to use race to distort a bona fide seniority system. As this Court emphasized, in quoting the congressional history of Title VII:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis.* He would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Teamsters v. United States, 431 U.S. 324, 350-51 (1977), *quoting* 110 *Cong. Rec.* 7213 (1964) (emphasis by the Court.)

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[27]Following layoffs in the spring and recalls in the fall, 70 teachers lost their jobs to layoffs in the 1981-82 school year. (Pet. L. 1-2). The teacher seniority list for that year (J.A. 57-99) shows that if strict seniority were followed, there would have been 50 minority teachers and 387 non-minority teachers in the school district. Thus, 11% of all teachers would have been minorities, which compares quite favorably to the relevant labor market indicators as shown in Table A.

III. RACIAL PREFERENCES FOR DETERMINING TEACHER LAYOFF RIGHTS CANNOT BE JUSTIFIED BY REFERENCE TO PROPORTIONAL REPRESENTATION FOR MINORITY STUDENTS IN THE ABSENCE OF A CONSTITUTIONAL VIOLATION OF STUDENT RIGHTS THAT REQUIRES SUCH A REMEDY.

As this Court held in *Milliken v. Bradley,* 418 U.S. 717, 744 (1974) (hereafter *Milliken II*), "[t]he controlling principle [is] that the scope of the remedy is determined by the nature and extent of the constitutional violation." In that case, a cross-district busing order in a school desegregation suit was overturned because the trial court imposed its decree on school districts that had not been found to have acted unconstitutionally. Similarly, in *Pasadena City Board of Education v. Spangler,*[28] this Court held that a federal District Court had no power to order a school system to maintain a particular racial mix of students once the effects of unlawful *de jure* segregation had been eliminated.

Milliken II and *Pasadena* involved the extent of judicial power to remedy discrimination. Nevertheless, they should apply here, for they hold that race-conscious remedies are constitutional if, and only if, they are predicated upon constitutional violations and are designed to remedy the identified injury. If this constitutional principle constrains the equity jurisdiction of district courts, it should constrain other governmental actors as well. *Cf. Shelley v. Kraemer,* 334 U.S. 1 (1948). (Judicial action is no less subject to equal protection guarantees.)

In the school desegregation context, this Court has affirmed the remedial power of the federal courts, and by

[28]427 U.S. 424 (1976).

implication, the discretionary authority of educators, to correct unconstitutional segregation through race-conscious assignments of black and white teachers. In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), this Court decreed that the ratio of white to black teachers in each school be "substantially" the same as the ratio throughout the system. *Swann,* 402 U.S. at 20. But this race-conscious assignment policy applies to blacks and whites alike as regards an existing teaching staff. It speaks to *where,* not to *whether* particular teachers will work.

As important as race-conscious remedies have been in school desegregation cases, this Court has never defined nor endorsed them in preferential terms.[29]

In this regard, Respondents have referred to the Philadelphia School District's voluntary race-conscious teacher assignment program under which each school was required to have between 75% and 125% of the existing proportion of black teachers employed district-wide.[30] *Kromnick v. School District of Philadelphia,* 739 F.2d 894 (3rd Cir. 1984) (upholding the plan). However, Philadelphia's race-conscious assignment policy does not call for preferential treatment. Therefore, *Kromnick* does little

[29]In *Bakke,* this Court did not defer to a university so far as to endorse a minority admissions quota. Although Justice Powell did suggest that a public educational institution may use race-based preferences to achieve diversity in its student body, 438 U.S. at 305, he insisted on a prior findings of discrimination by a competent body. 438 U.S. at 307, 314-15. Nor was the University's Board of Regents deemed competent to remedy "societal discrimination." 438 U.S. 309, 310.

[30]Respondents' Brief Opposing the Petition for *Certiorari* at p. 4.

to support Respondents' position. Again, the assignment policy in *Kromnick* addresses where—not whether—a particular teacher will work.[31]

Moreover, the case before this Court is *not* a school-desegregation case, where the rights of innocent third parties may have to give way to the necessity of dismantling segregation and eliminating its effects upon the educational experience of minority students.[32] In such cases, "the nature of the violation determines the scope of the remedy," *Swann,* 402 U.S. at 16.

Accordingly, in *Arthur v. Nyquist,* 712 F.2d 816 (2nd Cir. 1983), the court held that while a district court may override a seniority system which perpetuates a racially segregated school system, it may "not exercise this power excessively," and must balance "individual and collective interests." 712 F.2d at 822. The court also emphasized that any relief which infringes upon the seniority rights of non-minority teachers must be strictly "necessary to correct constitutional violations." 712 F.2d at 822.

In this case, there are no legitimate competing interests to be balanced. Petitioners have a constitutional right to equal protection of the laws and there is no countervailing discrimination to be remedied. As shown by the Racial/Ethnic data (set forth in detail at pages 15-34 of the Sixth Circuit Joint Appendix), there are no segregated schools in the Jackson School District. Minority teachers and students are evenly distributed throughout each of the schools in the district, and the district is completely integrated.

[31]The labor contract provisions in the Jackson School District requiring teacher school assignments by race are not questioned here.

[32]Casting the net broadly, the Sixth Circuit opened its opinion with the statement that: "This is a school case tangentially involving segregation in public schools. . . ." [App. 2a.]

Even in the context of dismantling a segregated school system, students do not have a constitutional right to attend a school with a teaching staff of any particular racial composition. *Fort Bend Independent School District v. City of Stafford,* 651 F.2d 1133 (5th Cir. 1981) (holding that the percentage of minority faculty need not approximate the percentage of minority students). As regards the teaching staff, the students are only entitled to the "sustained good faith effort to recruit minority faculty members so as to remedy the effects of any discriminatory practices." 651 F.2d at 1140. *Accord, Oliver v. Kalamazoo Board of Education,* 706 F.2d 757, 762 (6th Cir. 1983).

The case before this Court involves an integrated school district that has, for at least the past 15 years, consistently employed minority teachers at a rate well in excess of their availability in the relevant labor market.[33] Accordingly, there is no discrimination in teacher employment *or* education. In the absence of such violations, the decision below cannot be sustained.

IV. A RACIAL PREFERENCE THAT SINGLES OUT A FEW NON-MINORITY TEACHERS TO BEAR THE BRUNT OF LAYOFFS IS NOT A NECESSARY OR PROPER MEANS OF PROVIDING ROLE MODELS FOR MINORITY STUDENTS.

As already demonstrated, there is no discrimination in teacher employment or student education. Therefore, the "role model" rationale invoked below must stand or fall on its own merits or lack thereof.

[33]Between 1972 and 1981, 25% of the 126 new teachers hired by the district were minorities. (J.A. 55.)

More often than not, the role model rationale has been invoked by educators to justify segregation of existing minority faculty into predominantly minority schools.[34]

In *U.S. v. School District of Omaha,* 521 F.2d 530 (8th Cir. 1975), the school district sought to justify faculty segregation on the grounds that black "role models" should be assigned to teach black children. In rejecting this contention, the Eighth Circuit observed that.

> "such a belief—if truly held—reinforces rather than undercuts the presumption of segregative intent with respect to students, since it would logically suggest herding black students into their own schools where they could be taught by their proper black role models."

521 F.2d at 539 n.14.

Other courts have not hestitated to reject the "role model" rationale as a basis for the assignment of faculty and staff:

> It is not contended by this Court that minority role models are not important for minority students. Racial and ethnic pride is its value. But, in the constitutional scheme, a higher value in the hierarchy is integration. Integration, and the understanding it fosters, will provide both black and white role models for both black and white children.

Arthur v. Nyquist, 415 F. Supp. 904, 946 (W.D.N.Y. 1976).

The Jackson School District has an integrated faculty and student population in each school throughout the district. There is no shortage of role models for minority

[34]See, e.g., *U.S. v. School District of Omaha,* 521 F.2d 530, 538 n. 14 (8th Cir. 1975); *Morgan v. Kerrigan,* 509 F.2d 580, 596 (1st Cir. 1979); *Reed v. Rhodes,* 607 F.2d 714, 725 (6th Cir. 1979).

students. In 1981-82, the same year as the layoffs of Petitioners, Wendy Wygant *et al.,* 19% of the coaching positions were filled by minority staff [J.A. 105]; 28% of all teacher aides were minorities [J.A. 106]; 16.7% of the administrators were minorities [J.A. 107]; and 13% of all teachers were minorities.[35] At the same time, the minority student population was 27.5%. [Pet. L. 65.] Thus, it is unnecessary to nullify the equal protection rights of non-minority teachers by single-mindedly insisting on a fixed mathematical ratio of minority teachers to students in order to provide "sufficient" number of role models.

Significantly, the Respondents did not offer a shred of evidence in the courts below to support this rationale. As a result, the district court's sole authority for the role model rationale was the soon-to-be reversed case of *Oliver v. Kalamazoo Board of Education,* 498 F. Supp. 732 (W.D. Mich. 1980), *rev'd,* 706 F.2d 757 (6th Cir. 1983). The district court in *Oliver* had ordered hiring and layoff quotas that would have maintained a 20% black teacher staff, based in large part on the opinion of an expert witness who testified that a "critical mass" of black teachers was needed to serve as "role models." 498 F. Supp. at 748. The Sixth Circuit specifically rejected the role model rationale as "arbitrary" in relation to the goal of proportional representation.

Furthermore, Petitioners' research of the professional literature on the subject shows that the role model con-

[35]As noted previously, the 13% figure for minority teachers is the percentage before the layoffs. Actually, after operation of the minority preferences, 16% of the teaching staff were minorities for the 1981-82 school year. Table C. Had strict seniority been followed, minority teachers would have comprised 11% of the teaching staff. Supra 31, n. 27.

cept has little empirical support.[36] *See,* Speizner, ***Role Models, Mentors, and Sponsors: The Ellusive Concepts,*** 6 SIGNS 692, 693 (1981). According to Jeanne Speizner, the concept of role models, in the context of race or gender, first appeared in the literature of education, psychology and sociology in the early 1970's. But these studies focused primarily on white females and were not based on careful empirical research. *Speizner, supra,* at 694 n.145, 708. The methodology was, in Speizner's assessment, who undertook a comprehensive survey of them, "piece meal rather than systematic, anecdotal rather than observational." *Speizner, supra,* at 708. The findings of these studies also varied widely and were contradictory. *Speizner, supra.*

Speizner suggests that the popularity of the notion of race-alike role models may be based on a "psychosocial" assumption, turned into stereotype, that black children suffer from low self-esteem. Only recently has research systematically addressed these assumptions about role modeling and black self-esteem.[37] This recent research

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[36]Petitioners acknowledge the kind of assistance of Professor Monique Weston Clague of the University of Maryland. The discussion that follows was adopted from a draft of her article to be published in the *Journal of Law and Education.*

[37]This statement is based on Petitioners' computer-assisted search of the Educational Resources Information Center (ERIC) data base, as well as the work of Professor Clague, *supra.* ERIC descriptors grouped under the heading Black Teachers were: Role Models, Student Achievement, Teacher Effectiveness, Teacher Influence, Mentors and Student-Teacher Relationships.

does not support such assumptions about role models.[38] For example, the studies that used control groups to factor out economic background conclude that the black children in the studies did not have lower self-esteem than white children and that the more important correlate of low self-esteem is low income.[39]

The *Amicus* brief of the Anti-Defamation League of B'nai B'rith points out that other studies indicate "that minority students perform better academically when their teachers are chosen on the basis of merit or seniority than they do when their teachers are chosen on the basis of racial compatibility."[40]

Finally, let us assume that Wendy Wygant and the other individual Petitioners before this Court are dedicated teachers who encourage and work well with their minority students. And let us further assume that these minority students will inevitably know that Wendy Wygant and

---

[38]Indeed, one study that measured the change in self-esteem of a group of black children and white children over a three-year period found that, on the general self-esteem measure, black children "demonstrated a larger number of changes that were positive than did the white group." Hare, *Stability and Change in Self-Perception and Achievement Among Black Adolescents: A Longitudinal Study,* 11 Journal Of Black Psychology, 29, 31 (1985) (the study was based on the Champaigne, Illinois school system where twenty-three percent of the school children are black). Another recent study also challenges the view that inter-city black adolescents have negative self-concepts. Ford, *Self-Concept and Perception of School Atmosphere Among Urban Junior High School Students,* 54 Journal Of Negro Education, 82 (1985).

[39]Hare, *American Journal of Psychiatry, supra* at n. 38.

[40]Brief of B'nai B'rith, *supra,* at page 22. The Brief refers to the findings of Professor Eric Hanushek in *Education and Race* (Heath, 1972); and Hanushek, *Throwing Money at Schools,* 1 Journal of Policy Analysis and Management 19 (1981).

the others were selected for layoff just because they are white. This surely must teach school children of all races the wrong lesson. It teaches the Jackson School children that achieving the benefits of society depends more on one's race than on individual effort, merit and performance.

V. PETITIONERS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION CANNOT BE DETERMINED BY A MAJORITY VOTE ON A LABOR CONTRACT THAT REQUIRES ASSIGNMENT OF JOB RIGHTS BASED UPON RACE.

This Court has never hesitated to strike down restrictive or discriminatory provisions in collective bargaining agreements. *See e.g., Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (holding that when an employer violated the Equal Pay Act, such violation was not cured by a collective bargaining agreement, since the agreement itself perpetuated the discrimination); *See also, Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed* 404 U.S. 1006 (1971) (Title VII rights cannot be bargained away by a union, and if a discriminatory provision is acceded to, the union as well as the employer will be held liable). Accordingly, a collective bargaining agreement is no shield for employer violations of constitutional or statutory rights.

Underlying the opinions below is the notion that the use of race that burdens comparatively few non-minority employees must be reasonable simply because the employer and union agree to it. The district court obviously held this view. It said:

> [I]t is undeniable that the contract, and thus the challenged layoff provision, was collectively bargained. It is difficult for the Court to conceive how a plan which has been voluntarily adopted by the membership of the JEA (Jackson Education Association) can invidiously trammel the interests of white teachers, a majority of the JEA.

[App. 33a].

This reasoning stereotypes white teachers as sharing identical interests simply because they are white. Wendy Wygant *et al.*, are the Petitioners here, not "white teachers" or the "white race." The question before the Court is whether the individual Petitioners have been discriminated against on the basis of their race, not whether "whites" as a group have been disadvantaged. *See, Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (Fourteenth Amendment rights are personal rights guaranteed to individuals.)

In any event, when it comes to ratifying a proposed contract, each member can be expected to vote his or her *economic self-interest*, regardless of race. The district court's stereotyping simply misses the fact that union members typically have a wide diversity of interests. In this case, the majority of Jackson School District teachers in the bargaining unit have enough seniority to be immune from layoff. One cannot expect them to vote against an economic contract package just because it also calls for minority layoff preferences that will adversely affect a small number of teachers in the bargaining unit.[41] But this Court cannot permit the guarantees of the Equal Protection clause to turn on the outcome of a contract vote.

---

[41]The 1981 teacher seniority list (J.A. 57-100) shows that a substantial majority of the teachers employed in 1981 had more than twelve (12) years seniority. Of the 517 teachers on the 1981 seniority list, 314 were hired before 1969. And 92 of the teachers, or 8%, had over 20 years seniority.

CONCLUSION

The Petitioners' constitutional rights to Equal Protection of the laws have been violated by the Respondents' racial preferences, which do not have a proper remedial purpose. The judgment below must therefore be reversed and the case remanded for a determination of damages, costs, and attorneys' fees as may be authorized by law.

Respectfully submitted,

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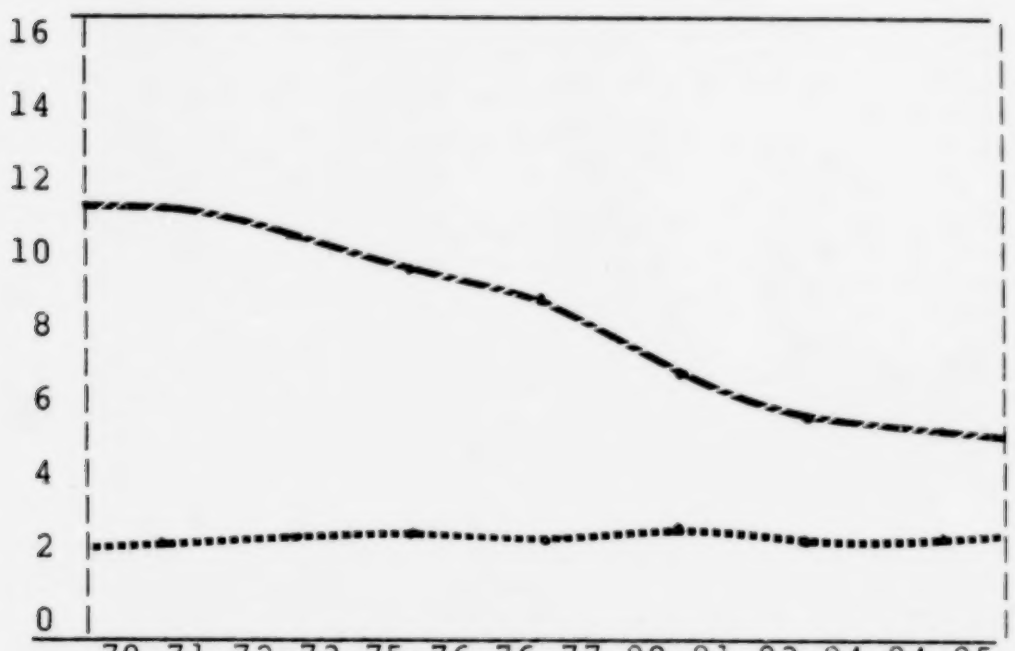
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TABLE A
MINORITY AND WHITE STUDENTS
IN THE JACKSON SCHOOL DISTRICT
FOR SELECTED SCHOOL YEARS



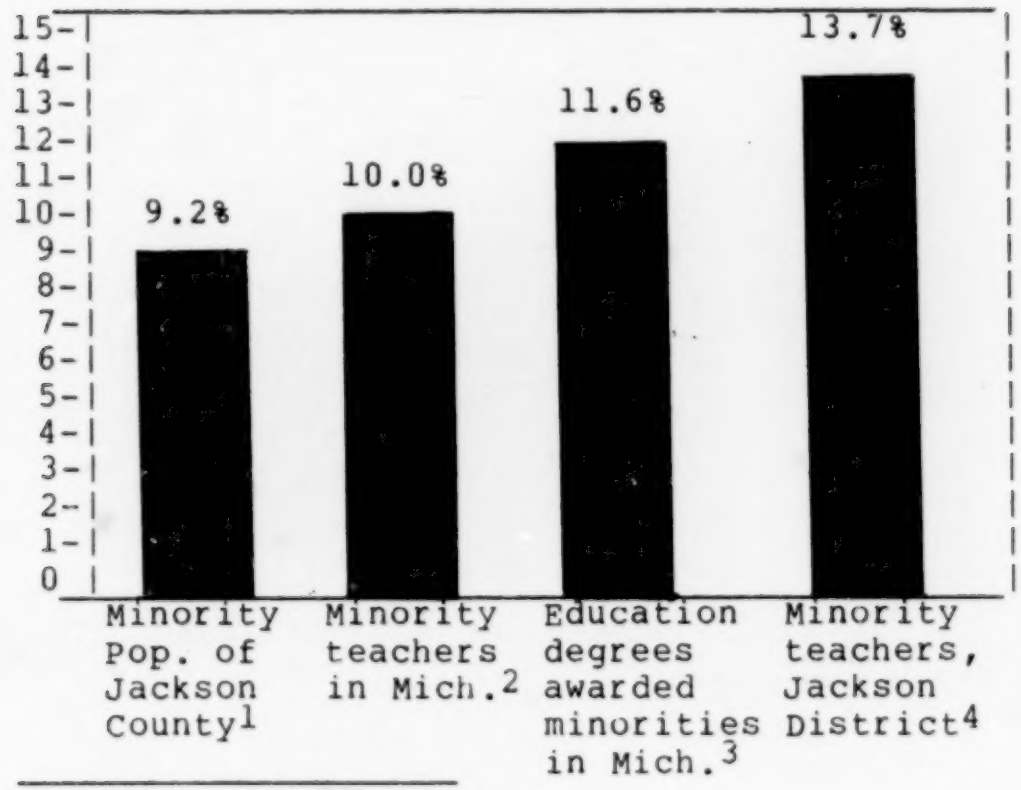
School	Minority		White	
1970-71**	2,199	(16.2%)	11,379	(83.8%)
1972-73**	2,271	(17.4%)	10,793	(82.6%)
1975-76*	2,353	(19.9%)	9,463	(80.1%)
1976-77*	2,290	(20.6%)	8,830	(79.4%)
1980-81*	2,419	(26.4%)	6,739	(73.6%)
1933-84**	2,285	(29.1%)	5,583	(70.9%)
1984-85**	2,323	(30.0%)	5,425	(70.0%)

Sources:

* JA at p. 104.

** Petitioners' Lodging at pp. 56-62.

TABLE B
LABOR MARKET INDICATORS FOR 1979-80



Sources: (Petitioner's Lodging)

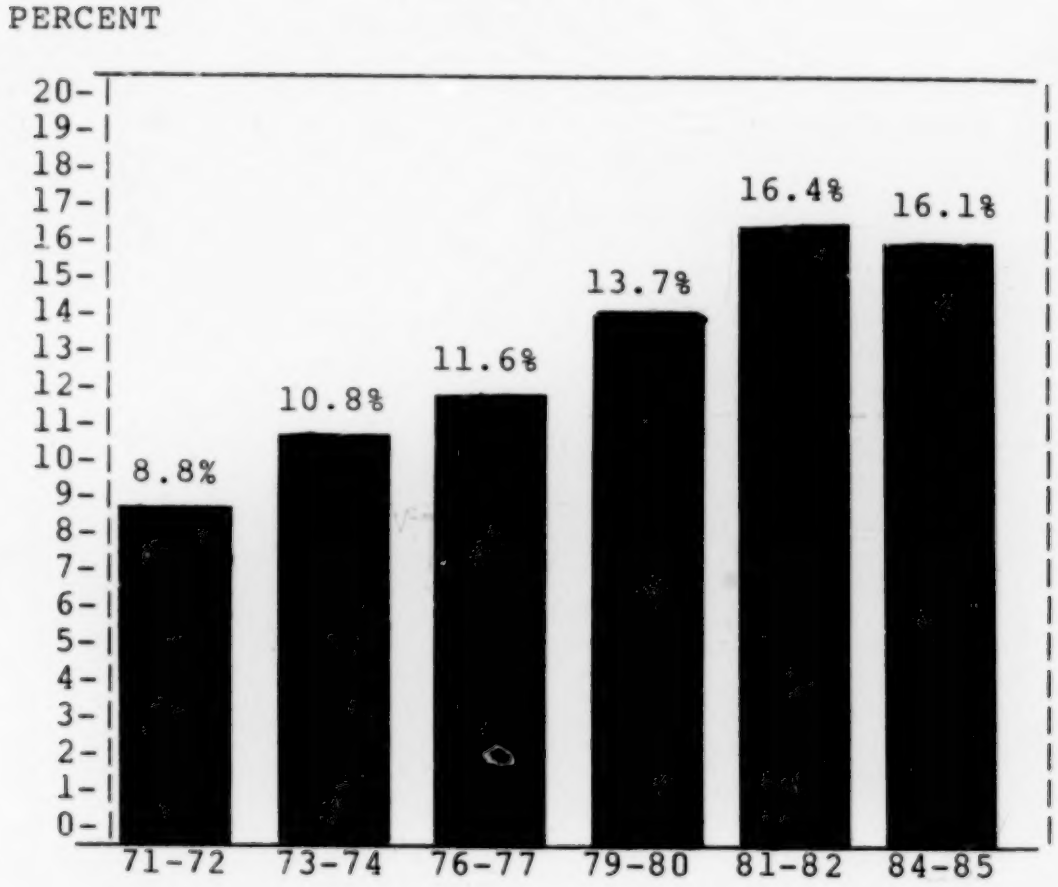
1 U.S. Census Bureau, Summary Table File 3A, (Mich. Dept. of Civil Rights, Research Evaluation and Data System Bureau).

2 EEOC Equal Opportunity Reports - 1979, Minorities and Women in Public Elementary & Secondary Schools, Table I, p. 102 (Mich. Elementary and Secondary Teachers).

3 U.S. Dept. of Educ./Office for Civil Rights, Data on Earned Degrees Conferred by Institutions of Higher Education by Race, Ethnicity, and Sex, Academic Year 1978-79, Vol. I, Table 7, p. 1260.

4 Mich. Dept. of Educ., Racial Ethnic Census by Building, 1979-80 School Year, Jackson Public Schools District Totals, p. 345.

TABLE C
PERCENTAGES OF MINORITY TEACHERS
IN THE JACKSON SCHOOL DISTRICT
FOR SELECTED SCHOOL YEARS



Sources:

Mich. Dept. of Educ./Racial, Ethnic Census, Petitioners' Lodging at pp. 56-62

Supreme Court, U.S.
FILED
AUG 23 1985
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CLERK

No. 84-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President; and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. May the responsible local school board—after complaints, careful investigation, and full deliberation—adopt a faculty integration program as part of an overall effort to provide an integrated system of public schooling, particularly in view of a history of chronic underrepresentation of minority schoolteachers and a plausible showing of past discrimination on the part of the board with respect to staff as well as students?

2. Is the particular collective bargaining provision on teacher lay-offs—which was carefully tailored in negotiations between the board and the teachers' certified representative so as to implement the board's laudable integration effort during a difficult time of declining enrollment and to distribute the burden of lay-offs equally among minority and non-minority teachers in order to avoid stigmatizing any teacher as inferior or unqualified —barred by Section 1 of the fourteenth amendment?

3. Was the district court correct in denying plaintiffs' motion for summary judgment and in granting the Jackson Board of Education's motion for summary judgment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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Respondents.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete and does not contain all that is material to the consideration of the questions presented, as is required by Supreme Court Rule 34.1(g). Petitioners ignore the procedural posture and undisputed record below when the trial court ruled on the cross-motions for summary judgment and when the Court of Appeals affirmed. Many of the "facts" set forth in Petitioners' brief are drawn from "Petitioners' Lodging" in this Court and find no support in the record of this case.[1]

[1] In the text of our statement of facts, we therefore set forth the prior proceedings and record made below on the cross-motions for summary judgment. Like the District Court, *Wygant v. Jackson Board of Education*, 546 F. Supp. 1195, 1197-99 (E.D. Mich. 1982) and appeals court, *Wygant v. Jackson Board of Education*, 746 F.2d

A. Prior Proceedings

Petitioners, who are laid-off Jackson, Michigan public schoolteachers, filed their complaint in the District Court in 1981, alleging violations of their civil rights under 42 U.S.C. §§ 1981, 1983, and 1985, and of the fourteenth amendment. No answer was filed, because the Jackson Board of Education moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, for summary judgment under Fed. R. Civ. P. 56. Petitioners also moved for summary judgment. There was no discovery and no depositions or admissions of fact under Fed. R. Civ. P. 29. No evidentiary hearing was held, and no facts were contested by affidavit or other evidence.

However, during oral argument on the cross-motions, Petitioners explicitly conceded the facts as set forth in the Jackson Board's summary judgment papers (Tr. of 2/23/82 hearing, at 5-6); while Petitioners argued that the court should draw certain inferences from these facts, they never asserted any other facts concerning the history or purposes of the lay-off provision which they are attacking. Indeed, when a single oral remark of school board counsel was momentarily questioned by Petitioners' attorney at the hearing, he prefaced his inquiry with the comment that "I thought we didn't have a dispute on

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1152 (6th Cir. 1984), we proceed on the understanding that in the Courts below, the Petitioners did not dispute the operative facts set out in our summary judgment papers, though we realize that each side has drawn different inferences from them. These undisputed facts demonstrate that a plausible showing that there had been prior discrimination against black students and teachers in the Jackson Public Schools provided the context for the Jackson Board's ongoing desegregation effort, of which the challenged lay-off provision is an integral part. In footnotes, we add the underlying facts of public record which belie Petitioners' claims in this Court that there has never been any prior discrimination in the Jackson school district. We have asked the Clerk of each federal or state tribunal or agency that holds these records to transmit certified copies to the Clerk of this Court.

the facts" (*id.* at 6).[2] The facts contained in the Jackson School Board's summary judgment motion brief were thus undisputed, as District Judge Joiner stated in his opinion, *Wygant v. Jackson Board of Education*, 546 F. Supp. 1195, 1197 (E.D. Mich. 1982).

The District Court dismissed Petitioners' asserted federal claims. Based upon the undisputed facts, Judge Joiner ruled that the lay-off provisions of the collectively bargained contract were substantially related to the constitutional objectives of remedying past discrimination, correcting substantial and chronic underrepresentation of minority staff, and providing for an integrated system of schooling. 546 F. Supp. at 1201-02. Petitioners appealed, but the Sixth Circuit Court of Appeals affirmed. *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984). The Court of Appeals held that the "school board (and bargaining representative of the teachers) have a legitimate interest in curing the past racial isolation of black teachers in the school system." 746 F.2d at 1157. Both the majority and concurring opinions also noted approvingly the procedural safeguards inherent in such a collectively bargained-for lay-off provision. *Id.* at 1158-59, 1161. *Certiorari* was granted by this Court on April 15, 1985.

B. Undisputed Facts from District Court Brief [3]

"In the school year 1950-51 the Jackson Public Schools hired 48 new teachers; in 1951-52, 58 new teachers; in

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[2] Similarly, school district counsel Susskind stated at the hearing that "I don't believe, in either of our briefs, we set forth any fact that would be of any substantial nature that would show any disagreement. There is no issue to try before this Court." (Tr. 5-6.)

[3] All of the facts recited below were set forth in the brief supporting the Jackson Board's motion for summary judgment in the district court. Both the district court, 546 F. Supp. at 1197, and the Court of Appeals, 746 F.2d at 1157, proceeded on the understanding that these facts were not disputed, based on Petitioners' concession to this effect at the hearing on the summary judgment motions. The text of this brief therefore quotes *verbatim* from the statement

1952-53, 83 new teachers and in 1953-54, 61 new teachers were added to the staff. Carrie Hannan was among the 61 newly hired in 1953-54 and she became the first black teacher hired in Jackson. At that time the system had 9,966 students and 355 teachers. The pace of minority hiring was slow from 1953 to 1961. As of the latter date, ten members of a teaching staff of 515 were minority members for a minority ratio of 1.8 percent. The student enrollment had climbed to 12,611 by 1961.

"In the school year 1968-69, black students made up 15.2 percent of the total student population in the Jackson Public Schools, black members of the faculty constituted 3.9 percent of the total teaching staff.

"Jackson integrated its two senior high schools in 1963, and in the spring of 1969, with the building of the Northeast Junior High School, the district integrated the four junior high schools. The city-wide proportion of minority to majority was then established in the four junior high schools, and since those junior high schools fed into the two senior high schools, racial balance was substantially achieved in the secondary schools.

"The district then turned its efforts toward integration of the elementary schools. Various complaints had been filed with the Michigan Civil Rights Commission by the Jackson NAACP alleging segregation of elementary schools as well as discriminatory treatment of minorities in staff hiring and placement.[4] Efforts to integrate the elementary schools and to set up increased minority hiring were prompted, in part, by these complaints.

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of facts in the Board's district court brief supporting its summary judgment motion; the footnotes appended are from sources in public records which we have asked the appropriate court or agency clerks to furnish to this Court, *see supra* note 1. Copies of most of the materials cited in the footnotes may also be found in Respondents' separate Lodging with this Court.

[4] In April, 1969, the Jackson branch of the NAACP filed a detailed complaint with the Michigan Civil Rights Commission (Complaint No. 6585) alleging that the Jackson Public Schools were engaging in a variety of racially discriminatory practices. The complaint specifically asserted that "The Jackson Public Schools are discriminatory in hiring practices." In addition, the NAACP asserted that there was discrimination in discipline, curriculum, and relations with the parents of black students. The NAACP complained as well about the attitudes of the virtually all-white teaching staff, asserting that lower black student achievement was occurring because "teachers have lower expectations of black students . . . [and] teachers and administration interact negatively with black students on the basis of preconditioned methods and techniques of dealing with black students." The complaint asserted that "the counseling program is discriminatory; that counselors are not sensitive to the needs of black students; that counselors do not relate to realizing the educational . . . potential of black students."

The Commission's investigation into these charges revealed substantial evidence of intentional segregation and discrimination, including in hiring and assignment of teachers. *See, e.g.*, Preliminary Investigation Report, June 16, 1969, at 8. The Superintendent of Schools acknowledged that the "imbalance" of black teachers in the system was unacceptable, but argued that final hiring decisions were made by the principals of the various schools; other evidence suggested that the system's central personnel office was deliberately steering black applicants to the predominantly black schools. The results were clear: Eight of the nine all-white schools had all-white faculties (Cascades, Dibble, Firth, Columbia, Huntington, Ridgeway, Sharp Park, and Trumbull), while half of all the black teachers were concentrated in just two schools (McCulloch and Helmer) whose pupil enrollments were 72% and 79% black, respectively. (*See id.*, exhibits 14 and 19.) The Commission's investigation resulted in the conclusion that "*each* of the allegations as stated in the complaint can be substantiated . . ." (emphasis supplied).

In the face of these findings, the Jackson School Board agreed on September 10, 1969 to undertake an ongoing program to integrate the school system, which the Commission approved. This agreement contained specific provisions dealing with each of the NAACP allegations which the commission's investigation had sustained. With regard to its employment practices, the Board agreed to

> [t]ake affirmative steps to recruit, hire, and promote minority group, teachers and counselors as positions become available and pursue other programs now in progress to provide equality of opportunity.

(Notice of Disposition, ¶ II(5).)

"To facilitate the accomplishment of these goals, the superintendent formed a Professional Staff Ad Hoc Committee, which made a preliminary report in October, 1969. That report included a priority recommendation that within a year each of the 22 elementary schools in Jackson should include at least two minority members on the school staff.[5] The Superintendent of Schools and the Executive Secretary of the Jackson Education Association (JEA) served as members of the Committee. The JEA had served as collective bargaining representative for all teachers in Jackson since 1966.

"At the time of this recommendation by the Ad Hoc Committee, only three of the 22 elementary schools had at least two minority teachers on the staff. To implement the recommendation at that time, the system would have had to immediately hire some 40 additional minority teachers.

"A Citizens Schools' Advisory Committee was then formed, with various subcommittees. The Committee studied all aspects of integration, including teacher hir-

[5] The committee concluded that an increase in the number of minority teachers was essential for the education of white as well as black students:

> Jackson needs more qualified minority group teachers, administrators and counselors . . . Minority group students . . . need to associate with persons of their own ethnic extraction who have proven levels of achievement. White students have to grow up in schools where successful minority group professional people are more frequent because the attitudes these students form in their school years are the attitudes they carry through life.

Racial Subcommittee Report, October 16, 1969, p. 1.

The Committee also concluded that minority teachers were deterred from working in Jackson because of community hostility and housing discrimination, and recommended that affirmative steps be taken to deal with those problems and to recruit minority teachers. *Id.*

ing and training.[6] A Professional Council was also formed pursuant to the collective bargaining agreement. The Professional Council was made up of an even distribution of administrators and representatives of JEA. Some 50 percent to 60 percent of council discussions during this period were involved with integration problems. In the words of the then Superintendent of Schools, 'the leadership of the JEA always indicated a sincere commitment to the same basic goals that the Board of Education had adopted with reference to development of a completely integrated school system.'

"In November of 1971, the Minority Affairs Office of the Jackson Public Schools recommended to the members of the racial subcommittee of the Citizens Schools' Advisory Committee the increased recruitment of minority teachers plus increased protection of minority teachers from layoff.[7] At that point in time, 15.9 percent of the

[6] In May, 1970, this second committee appointed by the school board issued a more detailed set of recommendations for the integration of the elementary schools. The method to be followed for integrating the students was, as in other communities, a matter of considerable controversy. The committee itself favored "the adoption of total racial integration as soon as possible," a step that it concluded would require busing. *See* Plaintiffs' Exhibit No. 2, *Jackson Education Association v. Board of Education of Jackson Public Schools*, No. 4-72340 (E.D. Mich. 1976) (hereafter *"Jackson I"*), "Elementary Redistricting Recommendation," at 2. But the committee found that the elementary school principals did not support "total racial integration of the elementary schools at this time" and that a large majority of the parents were "strongly opposed" to busing. Accordingly, the majority of the committee, over a number of vigorous dissents (*see id.*, "Addenda to Redistricting Subcommittee Report, comments of Mary Ann Alber, Alonzo Littlejohn, Carl Breeding, Bruce Wilkins), proposed a desegregation plan that involved no busing. The committee also urged, without dissent, the "integration of . . . the teaching staff throughout the district." *Id.* at 3; *see also id.* at 4 (urging "improving the mix of teachers").

[7] During the period from 1969 to 1972 when the problem of student desegregation was still under discussion, the Board took steps on its own to deal with the lack of black teachers caused by its prac-

students were classified as members of minorities, whereas only 8.8 percent of the faculty were minority members. The minority-majority faculty ratio for 1971-72 had increased from a 1970-71 ratio of 5.5 percent. This increase was a reflection of the intensified affirmative action hiring policy instituted by the district wherein the system was actively seeking black teaching candidates.

"The successful recruitment of minority teachers continued to be burdened, however, by economic circumstances and decreasing student enrollment. The straight seniority system mandated by the then existing collective bargaining agreement imposed the primary burden of layoffs on the 'last hired.' The 'last hired' were the very minority teachers the system was trying to recruit and retain. The affirmative action program was impeded by the effects of the seniority system.[8]

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tices, steps that would clearly be necessary if the 1969 goal of two minority teachers in each school were to be achieved. Affirmative steps were taken to recruit and hire more minority teachers. *See, e.g.*, Tr. of 3/31/76 hearing, *Jackson I* (hereafter "Tr. *Jackson I*") at 18-19 (testimony of Kirk Curtis, Executive Secretary of Jackson Education Association); Deposition of Lawrence Read, *Jackson I*, (hereafter "Read Dep.") at 5, 22. Between the 1967-68 school year and the 1971-72 school year, the number of minority teachers more than doubled, from 21 to 50. *See* Plaintiffs' Exhibit No. 15, *Jackson I*. The problems which ultimately gave rise to Article XII occurred in 1970 and 1971, when faculty lay-offs became necessary. As a result of the Board's past hiring practices, a substantial majority of the district's non-white teachers had less than three years of seniority. Under the collective bargaining agreement in effect prior to 1972, however, lay-offs were to be made on the basis of seniority; the 1970 and 1971 lay-offs thus substantially defeated the Board's recent efforts to recruit and hire more non-white teachers. The effect of that seniority rule, the school superintendent testified, was to "literally wipe out all the gain that had been made in terms of affirmative action . . . ." Read Dep. at 24. Minority teachers recruited and hired one year were simply laid off the following year.

[8] By the beginning of 1972 the leaders of the teachers' union, with the acquiescence of its members, had already begun to prepare possible alternatives to the seniority lay-off rule because the union

"In January of 1972, on the eve of commencement of negotiations for a new collective bargaining agreement, Walter Norris of the Minority Affairs Office of the Jackson Public Schools issued a questionnaire to all teachers, wherein the Superintendent solicited their views as to the system layoff policy. In the questionnaire he posed two specific alternatives, to-wit: continuation of a straight seniority system, or a freeze of minority layoffs to ensure retention of black teachers in exact ratio to the black student population.

"The questionnaire was not well received by the teachers or the Jackson Education Association. Ninety-Six percent of the teachers expressed a preference for the straight seniority system, and the JEA, feeling that the questionnaire constituted illegal interference with the bargaining process, threatened the filing of an unfair labor practice charge.[9]

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recognized that a modification of the rule was necessary to bring about integration of the staff. Tr. *Jackson I*, at 29 (testimony of JEA Executive Secretary Kirk Curtis). In February, 1972, the Jackson Board received a committee report recommending a desegregation plan for the fall of 1972, a proposal which included, as had the 1969 report, a goal of having no less than two minority teachers in every elementary school. Plaintiffs' Exhibit No. 7, *Jackson I*, at 2. The Board adopted that plan in March of 1972, *see* Read Dep. at 46, even though at that time there were still too few minority teachers in the system to meet that stated goal, Tr. *Jackson I*, at 27, and despite the fact that the minority teachers who were in the school district were particularly vulnerable to the seniority lay-off rule then contained in the Board's collective bargaining agreement.

[9] JEA Executive Secretary Curtis testified:

> . . . I felt that Mr. Norris was serving a union membership about what the union's proposals ought to be at the bargaining table. I felt it a very clear unfair labor practice and I so informed the Board. And in addition, we took the action of informing our building representatives at that point to instruct the membership to respond with B, which they did, about 93 percent.

Tr. *Jackson I*, at 25. *See also id.* at 29 ("In fact, at the time we indicated to the membership how we decided to have them vote we had even at that point, had been working on alternatives [to lay-offs

"In recognition of the serious disagreement on this issue, preliminary negotiations were commenced in the early spring of 1972.

"To correct this situation and to 'end up with a truly integrated school system,' representatives of the Board and the Jackson Education Association reached tentative agreement in the spring of 1972 on various clauses which ensured increased minority hiring and increased protection from layoff for the newly hired minority teachers. The layoff provision represented a compromise between a standard plant-wide seniority system and a rigid freeze for a certain percentile of minority teachers.[10] The collective clauses were eventually memorialized by an agreement which retroactively became effective on July 1, 1972.

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based solely on seniority], with their knowledge"). The union subsequently negotiated a modification of seniority-based lay-offs, *see infra*.

[10] The school superintendent and the union leader who had participated in the framing of Article XII gave similar explanations for that clause. First, Article XII was regarded as an "integral part" of the desegregation plan; without the limited protection it afforded to minority teachers, it would have been impossible to achieve the school Board's repeatedly expressed goal of desegregating the faculty and placing two minority teachers in each elementary school. *See* Read Dep. at 69 (without the lay-off provision "[e]verything else is in danger, if not destroyed"); Tr. *Jackson I* at 20 (change in lay-off rules needed "to prevent the fruits of recruitment from being wiped out the following spring"), 42 (testimony of JEA Executive Secretary Curtis). *See also*, Proposed Joint Pre-Trial Order, *Jackson I*, at 2 ("the active minority recruitment program was . . . suffering from the impact of continuing layoffs dictated by economic circumstances and magnified by the straight systemwide seniority system mandated by the existing collective bargaining agreement. To correct this situation, and to 'end up with a truly integrated system,' the board and the Jackson Education Association" agreed to adopt Article XII).

Second, the limited protection afforded by Article XII was regarded as essential to the school Board's future ability to attract and hire minority teachers. The Jackson School Board, like school boards throughout the country, hires most of its teachers from col-

"The key layoff language was contained in Article XII, B., 1, of the JEA-Jackson Public Schools agreement covering the period of July 1, 1972 through August 31, 1973.

"Although tentative agreement was reached on this issue in the spring of 1972, final ratification did not occur until the late fall of 1972.

"In February of 1972, the system experienced 'a violent (racially motivated) explosion at Jackson High School, probably the worst we had had,' which featured fighting and rioting among the students. On February 17, 1972, the Citizens Advisory Committee recommended that all elementary schools be desegregated as of the fall of 1972

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leges outside of, and far from, the city of Jackson itself. Read Dep. at 73-75. Many of the minority teachers whom Jackson wanted to attract were from southern colleges, and those teachers were understandably reluctant to move all the way to Michigan if they faced an imminent threat of lay-off. The lay-offs of large numbers of minority teachers in 1970 and 1971 made recruiting such teachers far more difficult, Tr. *Jackson I* at 20, and the abolition of Article XII would have "cripple[d] . . . greatly" the Board's efforts to recruit minority teachers, *id.* at 56; *see also id.* at 55 (convincing minority teachers to move to Jackson from the south "particularly difficult" without Article XII).

Third, both school officials and the teachers' union in Jackson regarded the presence on the faculty of a substantial number of minority teachers as essential to providing an effective education, particularly for minority students, Tr. *Jackson I* at 56 (testimony of JEA Executive Secretary Curtis):

> It is a great deal of help to both students and other staff in a particular school to have a mixed staff of minority teachers, black teachers on staff. Gives the black students someone they can, you know, have an affinity with if they can look up to, if you will and it gives, I think if anything, more importantly more accurate and better picture if you will of minority people to white students. . . .
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> Q. . . . [w]hen you arrived at the conclusion to have the affirmative action program . . . you did that for education reasons?
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> A. Well, yeah. I guess you could say that part of the educational setting is to present a multi-cultured environment. Children don't see black people as maids and menials, that they saw them as professional people. And that . . . is education.

and that racial balance be achieved on each elementary staff with a minimum of two black teachers to be included on the staff at each building. The Board, after considerable agonizing, adopted the recommendations, proceeded to prepare the community for the process, and made the necessary staff assignments.

"The elementary schools were then integrated in the fall of 1972.[11] The teachers reported to work even though final agreement had not been reached at the bargaining table. Services were not withheld by the JEA at the outset of school because it was felt that such action might be interpreted as a strike against integration. A strike eventually occurred in the late fall, but final agreement was ultimately reached.

"At the teacher ratification meeting, some protests were received in regard to the proposed contract layoff policy. Some critics claimed that the compromise represented a destruction of the teacher seniority system. The leadership explained that a staff racial mix was educationally sound and that the system needed black teachers. It was also noted that the new layoff policy was partially de-

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[11] In adopting the 1972 elementary school desegregation plan, and in pressing for a provision such as Article XII to assure the retention of sufficient minority teachers to implement the faculty aspects of that plan, school officials perceived that their action was required by federal law. Read Dep. at 65-68. By the spring of 1972 a number of other school districts in Michigan had been named in federal desegregation suits or were already under federal court orders. *Id.* at 43. In a written statement on the desegregation plan circulated to parents in April of 1972, the Jackson School Board explained why it was taking voluntary action rather than waiting for a court order:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. Many citizens know this to be true. Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.

Plaintiffs' Exhibit No. 8, *Jackson I*, question 4.

signed to correct past discriminatory policies. The teacher's leader stated that 'every single teacher accepted the premise that the presence of minority teachers was helpful.' The teachers ratified the contract.

"According to the Executive Secretary of the Jackson Education Association, the negotiation and ratification of the layoff language was the 'most difficult balancing of equities that he had ever encountered.' [12]

Shortly after ratification of the contract in the fall of 1972, the Superintendent of Schools, Dr. Lawrence Read, was fired.

"Layoffs were again necessary in the spring of 1973. The contract language was followed. In the summer of 1973, a new collective agreement was under negotiation. Following another teacher strike in the fall of 1973, a contract was completed. In spite of radical changes in personnel on the Board of Education since the spring of 1972, the same affirmative action and layoff language continued in the successor agreement. (Article VII, E, F and Article XII).

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[12] In the 1972 collective bargaining negotiations between the Board and the JEA, the Board had proposed that there be a complete freeze on the laying off of minority teachers, at least until the proportion of minority teachers reached 15% or 17%. Read Dep. at 28 ("[T]he business of not dismissing any minority teachers was certainly paramount in our objectives that year in negotiations, and I think that we would have like to have some kind of language in the contract that would have prohibited this"); Tr. *Jackson I* at 31. The union, however, strongly opposed this proposal. Read Dep. at 28-29. Article XII was ultimately agreed upon in the spring of 1972 as a compromise method of providing *some* protection for the newly hired minority teachers in order to permit implementation of the desegregation plan without placing on white teachers the entire burden of any lay-offs. *Id.* Although it had opposed the freeze, the union strongly favored Article XII. The union members were virtually unanimous in agreeing that there was a need for more black teachers, and Article XII was perceived as necessary to bring that about and to achieve the widely accepted goal of "having minority teachers in every building" and "to correct past problems." *See* Tr. *Jackson I* at 42-43.

"In April of 1974, the Jackson Public Schools announced the impending layoff of 75 teachers, 19 of whom were minority personnel. The ratio of minority personnel on the staff at said time was 11.1 percent. Ignoring the contract language and the ratio figure, the Board chose to retain all tenured teachers and failed to maintain the percentage of minority personnel which existed at the time of the layoff. As a consequence of this action, the minority teachers, through Linda Benson, filed a complaint in Federal District Court, alleging that the actions of the defendant, Jackson Public Schools, violated the Plaintiffs' civil rights. Concurrent with this claim was a request that the Federal District Court assume pendente jurisdiction over the breach of contract claim.[13] The Federal District Court, through Judge DeMascio's memorandum opinion and order dated January 12, 1977, refused to accept pendente jurisdiction over the contract claim.[14] This order was subsequent to a trial in the matter in which the aforesaid facts were proved and later

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[13] The Jackson Education Association brought the *Jackson I* suit in federal court together with two black teachers laid off as a consequence of the Board's non-compliance with Article XII. In Count I of their complaint, these plaintiffs asserted a federal cause of action, claiming that Board practices had the *effect* of discriminating against blacks; prior to trial, the plaintiffs amended this count to allege a violation of Title VII. Count II requested the federal court to exercise pendent jurisdiction over plaintiffs' state law contract claim seeking to enforce Article XII.

[14] The court ruled that the plaintiffs had presented their federal claim based on statistical disparities and effects solely as a jurisdictional predicate for resolution of their pendent state law contract claims, that "the proofs presented at trial were not directed at establishing violations" of federal law, and that instead the "dispute centers about a conflict between the provisions of a collective bargaining agreement and state law as interpreted by the Jackson Board." (J.A. 37.) Because any federal claim was advanced "to set forth a pretextual jurisdictional basis" (*id.*), Judge DeMascio refused to rule on the pendent state law claims and dismissed the case (*id.* at 37, 39.) Rather than pursue an appeal in the Sixth Circuit (J.A. 40), the Jackson Education Association eventually proceeded to state court to pursue the state law claim. (J.A. 40.)

stipulated to in *Jackson Education Association, Inc. v. Board of Education of the Jackson Public Schools*, No. 77-0011484 CZ (Jackson County Circuit Court, August 31, 1979).

"In this Circuit Court case, Judge Britten entered a declaratory judgment against the defendant, Jackson Public Schools, on grounds of the breach of contract, and thereby found the minority Plaintiffs entitled to relief and damages. In this opinion, Judge Britten held the affirmative action plan to be constitutional and not in violation of the Teachers Tenure Act. MCLA 38.105; MSA 15.2005.[15] As a result of this opinion, the defendant, Jackson Public Schools, formed its present conduct requiring the application of the affirmative action clause when layoffs were necessary at the close of the 1981-82 school year. Consequently, the laid-off white Plaintiffs filed the instant suit alleging the unconstitutionality of the affirmative action clause under the Fourteenth Amendment. . . ."

SUMMARY OF ARGUMENT

In 1972, following four years of investigating the causes and consequences of racial segregation of staff and elementary students, the Jackson Board of Education chose voluntarily to integrate its elementary schools and faculty. In so doing the Board showed its willingness to obey the spirit of this Court's directives in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Instead of litigat-

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[15] Judge Britten declined to hold that race-conscious affirmative action could only be promulgated by a court. Instead, he ruled that the democratic process and collective bargaining were the preferable method for resolving the difficult issues posed by efforts "to achieve the end of a truly integrated school system" (J.A. 42) and to overcome the effects of "societal discrimination." J.A. 49, 51-53. The state court therefore entered a declaratory judgment that the Board had violated Article XII and directed the Board to pay damages to the black teachers injured by that breach of contract.

ing the issue for years and eventually being ordered by the federal courts to take specific action, as happened in many neighboring school districts, the Jackson Board chose to conform voluntarily to its constitutional obligations as it understood them.

In light of this history, as well as of its sincere belief in the educational soundness of its goals, the Jackson Board of Education and the Jackson Education Association collectively bargained contract provisions that would promote the hiring and retention of minority teachers. As the responsible local education agency under state law, the democratically elected Jackson Board is a proper body to make this determination as to the consequences of its past discrimination and to establish ongoing desegregation and educational goals for its faculty and students. Such voluntary, good-faith desegregation efforts, contrary to Petitioners' contentions, are fully supported by this Court's prior rulings on appropriate remedies and permissible affirmative action. *See infra* Argument I.

Moreover, the particular race-conscious remedies implemented by the Jackson Board were fairly bargained with the teachers' certified representative. They were tailored to avoid dismantling the Board's ongoing affirmative effort to thoroughly desegregate the system of schooling while providing for the sharing of the burdens of lay-offs among minority and non-minority teachers without stigmatizing any individual or group as inherently inferior. *See infra* Argument II.

We recognize that this case arrives in this Court in a troublesome procedural posture because of the trial court's ruling on the cross-motions for summary judgment without the benefit of an answer or evidentiary hearing. We submit, however, that the lower courts properly understood that the Petitioners did not contest the basic facts below; these facts constituted at least a plausible showing of historic discrimination by the Jackson Public Schools against blacks, the effects of which were continuing to be felt by students in the school system. Thus, the lower

courts properly concluded that the use of reasonable, race-conscious criteria in retaining minority teachers was substantially related to overcoming the consequences of plausible past discrimination and assuring effective desegregated education in the Jackson Public Schools. *See infra* Argument III.

ARGUMENT

I. THE JACKSON BOARD OF EDUCATION MAY, CONSISTENT WITH THE FOURTEENTH AMENDMENT, ADOPT ARTICLE XII (THE RACE-CONSCIOUS LAY-OFF PROVISION) AS PART OF A PLAN TO REMEDY PRIOR DISCRIMINATION AND TO ACHIEVE THE EDUCATIONAL BENEFITS OF SCHOOL INTEGRATION FOR ITS STUDENTS.

The Jackson Board of Education believed that segregation in the elementary schools was caused, at least in part, by past policies of the Board and staff. This view was supported by a four-year study, including consideration by a "blue ribbon" citizens' advisory committee and an Ad Hoc Committee comprised of teachers and administrators, by complaints filed by the NAACP, by an investigation of the Michigan Civil Rights Commission, and by the Board's knowledge of its prior practices concerning teacher hiring and student and teacher assignment.[16]

Recognizing that 90% of the black students were housed in two black elementary schools, that the majority of the very small number of elementary-level black teachers were in those black schools, that black teachers had previously been chronically underrepresented on the Jackson staff, and mindful both of this Court's mandates in

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[16] *See Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2589 (1984) (O'Connor, J., concurring) (stating importance of presenting "plausible case of discriminatory animus" in adoption of seniority system to justify consent decree modification in *Stotts*); *United Steelworkers of America v. Weber*, 443 U.S. 193, 211 (1979) (Blackmun, J., concurring) (suggesting "arguable violation" standard for voluntary affirmative action).

Brown II, *Green*, and *Swann* and of the educational value of racially integrated education, the Jackson Board reached the logical conclusion that its elementary schools should at last be desegregated. Having voted to adopt a pupil desegregation plan, the Board at the same time determined to integrate the faculty.

The hiring, assignment and lay-off goals of the faculty integration plan were set forth in the labor agreement which was collectively bargained with the teachers' union to support the desegregation plan. On no occasion have the school system's hiring or assignment goals been challenged; this litigation has dealt solely with the lay-off provision, Article XII, which has been included by agreement of the parties in each subsequent contract.[17] The total number of teachers in the district has been declining as the total number of students in the school district declines. Absent Article XII, the district therefore would have very few minority teachers and the Jackson Board's effort to integrate its school system would be frustrated. The fourteenth amendment does not require this result.

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[17] At page 15, note 14 of Petitioners' Brief, an issue is apparently raised relative to "labor market figures." *See also* Pet. Br. at 17 n.15. This issue has no relevance to the case at bar since Petitioners have on no occasion sought to state a cause of action relative to the affirmative hiring provision, Article VII; their only mention of that article appears in paragraph 8 of their Complaint.

If there were a relevant dispute as to the appropriate labor market for hiring, however, the Jackson Board is prepared at any trial to demonstrate that the Jackson Public Schools have sought teachers (black and white) from a broad geographical area, principally out-of-state, and would also be able to prove that from an economic position, such districts as Kalamazoo, Grand Rapids, Detroit, and Lansing have been able to offer their teachers higher salaries and are culturally more attractive, placing Jackson at a competitive disadvantage within the in-state sub-market. Petitioners' failure to raise a hiring issue makes this inquiry into the relevant labor market unnecessary.

A. A Local School Board Is A Proper Governmental Body To Evaluate The Effects Of Its Past Conduct And The Need For An Integrated System Of Schooling, And To Adopt and Implement Effective Measures, Including Race-Conscious Measures, To Achieve These Ends. The Decision Of The Jackson Board Of Education To Integrate Its Schools And Faculties And To Collectively Bargain For A Reasonable Limitation On Minority Teacher Lay-Offs While That Goal Is Being Pursued Was Proper.

As demonstrated above, the record in this matter establishes that the lay-off provision, Article XII of the collective bargaining agreement, which Petitioners attack, is an integral part of a comprehensive voluntary effort by the Jackson Board of Education to integrate its public schools. Whatever may be the case with respect to other kinds of public agencies, the decisions of this Court leave no room to question either the competence or the obligation of local public school authorities to recognize and evaluate their own discriminatory conduct or that of their predecessors in office, and to develop and implement "whatever steps are necessary" to extirpate the remaining effects of that conduct, including taking such race-conscious steps as may be necessary.

In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the Court determined that classifications that harm an oppressed group are likely to be the result of invidious discrimination or prejudice. The Court in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*) focused on the need to undo the systematic effects of longstanding discrimination against blacks in public educational institutions, in order to assure a transition to a unitary system of schooling. In *Brown II*, it is affirmatively stated that the local school board is the proper entity to determine the need to integrate and is under a duty to do so:

> Full implementation of these constitutional principles may require solution of varied local school problems. *School authorities have the primary re-*

> *sponsibility for elucidating, assessing, and solving these problems*; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.

Brown II, 349 U.S. at 299 (emphasis supplied), quoted in *Swann*, 402 U.S. at 12.

Thus, it is well settled that the state and its local school board instrumentalities have a duty to remedy the consequences of their discriminatory conduct, *see, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 281 (1977); *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-38 (1968), and that the duty to integrate is a continuing and affirmative one. *See, e.g., Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

The precedents cited above amply support the actions of the Jackson Board of Education in this case. Plausibly believing from the facts put before it that the elementary schools were segregated, as to both pupils and teachers, supported by four years of study and by a Michigan Civil Rights Commission investigation, and mindful of this Court's mandates, the Jackson Board acted reasonably in 1972 in integrating the elementary schools and staff. Considering its first-hand knowledge of the facts, the Jackson School Board was justified in concluding that its prior student assignment and faculty hiring and assignment policies may have contributed to the segregated system of elementary education extant in 1972.[18]

[18] In view of the subsequent judicial decrees against nearby school districts in Michigan and in neighboring Ohio, the decision of the Jackson Board in 1972 voluntarily to integrate its schools on the basis of a comparable factual history as was developed in those cases should be a matter for celebration, not censure. If other school boards had made the same determination as the Jackson Board, the need for wide-ranging court orders might have been substantially lessened. *See Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Milliken v. Bradley*, 433 U.S. 267 (1977) (Detroit); *NAACP v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (Kalamazoo); *Berry v. School District of Benton Harbor*, 442 F. Supp. 1280 (W.D. Mich. 1977).

It then became the Board's obligation to design and carry out steps which would effectively remedy any prior misconduct on its part and establish a fully unitary school system for its students. The Court has described this affirmative duty as one requiring the elimination of all vestiges of school discrimination "root and branch," *Green*, 391 U.S. at 438. In *Swann*, 402 U.S. at 15, 22-31, the Court suggested that a local school board, in making the determination to integrate, should consider a wide range of factors in designing a remedy for the vestiges of prior segregation and discrimination. *Swann* and *Brown II* call for an evaluation by local school boards of the total factual situation presented in each case, and encourage local boards voluntarily to integrate without the necessity of suit either by the government or by individual parents.

In this light, it is not surprising that this Court has consistently recognized that race-conscious policies are frequently "the one tool absolutely essential" for redressing past discrimination, *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971), and that school boards may use that tool when integrating voluntarily or under court order. In *Swann*, for example, the Court made it clear that school districts could use race-conscious criteria in student assignment in order to achieve student integration even to the point of requiring that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." 402 U.S. at 16. (Here, the Jackson Board adopted much more flexible approaches to effectively integrate students and staff.)

The Court has recognized that although a blanket prohibition against race-conscious redress of discrimination might seem neutral on its face, like the prohibition in

Hunter v. Erickson, 393 U.S. 385 (1969) it would be far from neutral in its operation. Such a prohibition "would freeze the status quo that is the very target of all desegregation processes," *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *see North Carolina State Board of Education v. Swann*, 402 U.S. at 45-46 (stating that "'color blind-[ness]' . . . against the background of segregation would render illusory the promise of *Brown v. Board of Education*").

The Jackson Board of Education, a popularly elected governmental body, chose to come to grips with its own prior history of segregated schooling by adopting a variety of color-conscious programs to integrate its school system, including Article XII of its collective bargaining agreement dealing with teacher lay-offs. Petitioners criticize that decision because, as in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), no judicial finding of discrimination was made in this case. However, as Justice Brennan, in an opinion in which Justices White, Marshall, and Blackmun concurred, stated, *id.* at 364:

> [Any] requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

The Jackson Board has acted in accordance with the mandates of this Court. Where a school board voluntarily seeks to comply with a longstanding constitutional mandate to recognize, assess, and remedy its own possibly discriminatory conduct, its good faith and reasonable judgment should not be overruled or second-guessed.

Petitioners and the United States insist, however, that only an adjudication against it of unconstitutional conduct (with all of its attendant collateral consequences) will permit a local school board to undertake race-conscious measures to further integration. The asserted justification for this proposed prohibition on affirmative action programs is that, since our history has been so riddled with the use of racial classification by the majority to exclude, stigmatize and subordinate racial minorities, racial considerations can now never be taken into account by the majority in the process of seeking to remedy the stark and subtle vestiges of past discrimination. But to exclude from constitutional analysis both the historical context and purposes for which racial considerations are used serves neither logic, justice, nor our constitutional heritage. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Bakke*; *Washington v. Davis*, 426 U.S. 229 (1976); *Swann*.

If the Court were to accept the argument of petitioners and the Department of Justice, a school board concerned about the possibility of its own past discrimination would either have to undertake a lengthy recitation of details of its past questionable conduct at a public inquiry or wait until it was successfully sued in court before it could use reasonable race-conscious methods to cleanse its school system of the remaining vestiges of segregation and to provide an integrated education for its students.

In the instant case, the lay-off program merely protects gains in faculty desegregation from dissipation through the lay-off procedure. The parties to the collective bargaining agreement recognized that the Article XII language regarding lay-offs would adversely affect some white teachers, but felt it was necessary in order to protect the gains made through affirmative action hiring. The language was designed to protect against a "Catch 22" situation, wherein minority teachers would be hired, only to be immediately laid off, thereby continuing a pattern of racial exclusion of blacks from the previously segregated Jackson Public Schools.

To deny all use of racial consideration in the remedial context would create the following scenario: governmental actors could choose, in the face of past discrimination or disadvantage, to give preferential treatment to elderly people, military veterans, impoverished people, people from certain geographic localities, and even women, so long as such treatment was, at the most, "substantially related" to an important governmental purpose. *Only racial minorities* would be prohibited from receiving preferential treatment from the majority to remedy past discrimination.[19]

In approving Article XII, the District Court in this case adopted the test established by the Fifth Circuit in *United States v. Miami*, 614 F.2d 1322 (5th Cir. 1980), *modified*, 664 F.2d 435 (1981): "The reasonableness test asks whether the affirmative action plan is 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation." *Wygant*, 546 F. Supp. at 1202. As part of the ongoing school desegregation program, Article XII represents a reasonable and effective remedial tool for integrating the Jackson Public Schools. *North Carolina State Board of Education v. Swann*, 402 U.S. at 45-46; *Swann*, 402 U.S. at 25 ("As we said in *Green*, a school

[19] As stated in *Bakke*, 438 U.S. at 368 (Opinion of Brennan, White, Marshall & Blackmun, JJ.):

> Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

The interpretation of the fourteenth amendment as allowing some benign uses of race-conscious state action has been supported in several other opinions by members of this Court. *See, e.g., Bakke*, 438 U.S. at 320 (Powell, J.).

authority's remedial plan . . . is to be judged by its effectiveness").

B. Without Regard To Its Own Prior Discrimination, A Local School Board Is A Proper Body To Establish Affirmative, Race-Conscious Educational And Institutional Goals, And The Jackson Board's Action Was Appropriate In This Respect Also.

This Court, in its landmark decision in *Brown I* noted that:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate a recognition of the importance of education to our democratic society . . . . Today it is a principal instrument in awakening the child's cultural values, and in preparing him for later professional training, and in helping him to adjust normally to his environment.

347 U.S. at 493. In *Swann*, the Court expressly considered and explicitly rejected the argument that the Constitution requires that teachers be assigned on a "color blind" basis. 402 U.S. at 19. In that same case, the Court stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities*; absent a finding of constitutional violation, however, that would not be within the authority of the federal court.

402 U.S. at 16 (emphasis supplied). The Court repeated this view in *North Carolina State Board of Education v. Swann*:

> [S]chool authorities have wide discretion in formulating school policy . . . . [*A*]*s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.*

402 U.S. at 45 (emphasis supplied).

The broad scope of authority to take race into account is, of course, not limited to local school boards or to public agencies. In *Bakke*, 438 U.S. at 320 (Opinion of Powell, J.), the Court held that a medical school had a constitutionally valid interest in achieving an ethnically or educationally "diverse" student body, so that it could give "competitive consideration to race and ethnic origin" in determining admission to medical school. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court approved the constitutionality of a limited affirmative action program where Congress relied on findings of past societal discrimination against minority contractors. And in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court sanctioned the voluntary use of race-conscious practices by private employers and unions to alleviate the continuing barriers to employment opportunities for blacks in the skilled crafts. Here, the Jackson Board's interest in a reasonable affirmative action program is at least as compelling and valid as in *Bakke*, *Fullilove* and *Weber*.

In *Bakke*, as in this case, there was no judicial finding that the University of California at Davis had engaged in any past discrimination, 438 U.S. at 301 (Opinion of Powell, J.); nevertheless, Justice Powell viewed the race-conscious goals, though not the particular device of the University of California plan, as analogous to the Harvard College admissions program:

> [T]he [Harvard Admissions] Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. . . . [Only] 10 or 20

> black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. . . . [T]he Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body. . . .

Id. at 323 (Appendix to Opinion of Powell, J.). The institutional interest and educational needs of the medical school were the bases for Justice Powell's conclusion that the medical school could use race-conscious admissions criteria in order to achieve an "educationally diverse" student body. *Id.* at 315, 320.

Justice Powell noted that a state's interest in facilitating the health care of its citizens and in attaining a diverse student body in its educational institutions could be sufficiently compelling to support the use of racial classifications. 438 U.S. at 310-12. As he stated:

> The fourth goal . . . is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. . . . Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Id. at 311-14. Thus, the fourteenth amendment does not prevent a state or local government from implementing race-conscious measures to meet a sufficiently important government interest. *Bakke*, 438 U.S. at 362-69 (Opinion of Brennan, White, Marshall, & Blackmun, JJ.); *id.* at 314-20 (Opinion of Powell, J.). That principle controls the decision in the case at bar.

The Jackson School Board, as indicated earlier, was concerned both with educational values and the remedial

need to integrate. Even assuming there were *no* black students in the district, the Board's affirmative program for integrating staff still is a valid educational and institutional interest which would justify the race-conscious Article XII under the analysis of Justice Powell in *Bakke*, 438 U.S. at 311-14.

The Jackson Board concluded that white students should be exposed to black teachers and should be prepared to participate in a multi-racial society.[20] Believing that a multi-racial education was an important part of the educational function of the schools, the Jackson Board had added black culture courses to its curriculum, reviewed its other courses for racial bias, and worked hard to promote racial understanding in the community at the same time as it sought to integrate its elementary schools and faculty. This was part of the comprehensive commitment of the Board to an effective system of integrated education.

It is also significant that duly elected representatives of the teachers joined in this effort throughout the collective bargaining process. The Jackson Board was convinced that the presence of black teachers would bring an important perspective to students and faculty, and that such a diverse faculty would be able to relate valu-

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[20] *See Estes v. Metropolitan Branches, Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting from denial of certiorari) ("[T]he benefits of attending ethnically diverse schools [are] experience[s] that prepar[e] a child for citizenship in our pluralistic society"); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 495 (1982) (Powell, J., dissenting) ("[C]hildren of all races benefit from exposure to '"ethnic and racial diversity in the classroom"'") [citations omitted]. *Cf. Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (presence of minority employees in visible positions after long exclusion may lessen divisiveness); *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974); *Arnold v. Ballard*, 390 F. Supp. 723, 736 (N.D. Ohio 1975), *aff'd*, 12 FEP Cases 1613 (6th Cir. 1976), *vacated and remanded on other grounds*, 16 FEP Cases 396 (6th Cir. 1976).

able experiences and bring new perceptions to the classroom that would contribute to the students' total educational experience and add a needed balance to the faculty and curriculum.[21] Surely, such goals are not constitutionally barred by section one of the fourteenth amendment.[22] If a state university has a compelling interest

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[21] *See Berry v. School District of Benton Harbor*, 467 F. Supp. 721, 744, 748 (W.D. Mich. 1978) (Michigan State Board of Education 1966 Policy Statement and 1977 Guidelines requiring affirmative efforts to attract and hire minority teachers).

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), neither the State of Washington, the United States Government, 458 U.S. at 472 n.15, nor any member of this Court contested the notion that the Seattle School District could voluntarily use race-conscious methods to eliminate racially imbalanced schools, even in the absence of a judicial finding of past intentional discrimination, *see* 458 U.S. at 464 n.8. The dissenters in this Court argued that state-level educational policy should be able to override a local school board's voluntary decision to bus students. 458 U.S. at 488 (Powell, J., dissenting). In the present case, there has been no opposition from the state government. In fact, the Michigan Attorney General's office is filing an *amicus* brief on behalf of the State of Michigan and the Michigan Department of Civil Rights.

[22] Using an alternative constitutional approach, the Court could uphold the plan in this case by relying on the thirteenth amendment, which "[w]holly aside from the fourteenth amendment . . . envisions affirmative action aimed at blacks as a race." *Williams v. New Orleans*, 729 F.2d 1554, 1570, 1577 (5th Cir. 1984) (*en banc*) (Wisdom, J., concurring in part and dissenting in part).

The Justice Department, in the United States' *amicus* brief at 11-17, however, offers a stilted historical perspective on the Civil War Amendments which would bar all race-conscious action except of the type ordered by federal courts to provide narrow relief to specific victims of proven specific discriminatory acts. The fourteenth amendment was fashioned and approved by the same Congress that deliberately enacted race-conscious remedies for the primary benefit of blacks (both free blacks and the newly freedmen), as well as their white supporters who were singled out for harassment and oppression by the dominant white majority within several States. *See generally* Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause*, 80 Mich. L. Rev. 462 (1982); Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L.

in admitting a racially diverse student body,[23] it would seem that a local school board has at least as compelling an interest in attempting to secure a racially diverse faculty. Especially in the face of possible prior discrim-

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Rev. —— (June, 1985, forthcoming). This is hardly coincidental, for one of the chief purposes of the fourteenth amendment was to constitutionalize the remedies which the Thirty-Ninth Congress had already adopted in implementing the thirteenth amendment. *Id.* *See also* Briefs of *Amici Curiae* NAACP Legal Defense & Educational Fund, Inc.; National Council of Black Lawyers, *et al.*

In *Bratton v. Detroit*, 704 F.2d 878, 886, *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984) and *Detroit Police Officers Association v. Young*, 608 F.2d 671, 697 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the Sixth Circuit noted that a reverse discrimination claim brought by a white person is not a simple mirror image of a case involving claims of discrimination against minorities: "One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination, the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain." *See generally* Sandalow, *Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162 (1977); J. Ely, *Democracy and Distrust* (1980); Ely, *The Constitutionality of Reverse Discrimination*, 41 U. Chi. L. Rev. 723, 733 (1974); Dimond & Sperling, *Of Cultural Determinism and the Limits of Law*, 83 Mich. L. Rev. 3301, 3316-20 (1985).

Article XII does move with the grain of the Constitution, while the government's approach goes against that grain.

[23] *Bakke*, 438 U.S. at 314 (Opinion of Powell, J.); *see also* Davidson, Davidson & Howard, *The Riffing of Brown: De-Integrating Public School Faculties*, 17 Harv. C.R.-C.L.L. Rev. 443, 480, 482 (1982):

> The integration of faculties serves several purposes, only one of which is to provide employment to minority teachers who have been discriminated against in the past. Minority teachers provide diverse experience and approaches that benefit all students. More importantly, they provide a presence in the classroom that instills a sense of pride and self-worth in black school children and offers a more positive image of blacks to white students as well. Together, these effects provide an education which is truly equal to minority school children. . . . In the crucial area of education the interests of school children must be paramount if true equality is to be achieved.

ination, the parties to the collective bargaining agreement had sound reasons to believe there was a value in recruiting and maintaining qualified minority teachers to benefit all students and to enrich the entire faculty.

The affirmative steps to recruit and retain minority teachers set out in Article VII of the Jackson Public Schools labor contract are a legitimate response to the history of chronic underrepresentation of minority teachers in a system with a history of previously segregated schools and are educationally sound. Indeed, as we have suggested, affirmative action designed to increase the proportion of minority teachers in a school district is quite different, and arguably substantially more justified, than affirmative action in other employment contexts.

II. THE LAY-OFF PROVISION ADOPTED THROUGH THE COLLECTIVE BARGAINING PROCESS TO IMPLEMENT THE BOARD'S INTEGRATION PROGRAM IS REASONABLE AND PROPERLY TAILORED. IT DOES NOT VIOLATE THE FOURTEENTH AMENDMENT BECAUSE IT DISTRIBUTES LAY-OFF BURDENS EQUITABLY WITHOUT SINGLING OUT ANY TEACHER FOR STIGMATIC TREATMENT ON ACCOUNT OF RACE.

In *Weber*, *Fullilove*, and *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), this Court has expressed concern that affirmative action plans should be properly tailored. As Chief Justice Burger observed in *Fullilove*, 448 U.S. 484, however, "It is not a constitutional defect in this [affirmative action] program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible."

The provisions of the collective bargaining agreement at issue in this case cannot be objected to on constitutional or equitable grounds relating to third parties. First, Petitioners have had substantial opportunity to have their interest represented during the collective bargaining process. Moreover, because the union itself voluntarily modified the seniority system, no teacher can claim to have had a legitimate expectation upset. Finally, the relevant provision is tailored to achieve the school board's important interest in integrating its faculty through a mechanism which distributes the burdens of lay-off equitably among minority and non-minority teachers.

A. Unlike *Stotts*, In The Case At Bar, Petitioners And Other Third Parties Had Repeated Opportunities To Have Their Interests Represented.

It is important to note that the duty of fair representation in collective bargaining parallels the reach of the fourteenth amendment to forbid actions that are "arbitrary, discriminatory, or in bad faith" or seek to purposefully harm individuals on account of their race. *Compare Vaca v. Sipes*, 386 U.S. 171, 190 (1967) *with Washington v. Davis*, 426 U.S. 229 (1976). Petitioners, however, never have challenged the union's adoption of Article XII through procedures established under the National Labor Relations Act. The labor agreement also has, as part of its structure, a grievance procedure with mandatory arbitration, but Petitioners did not make use of that remedy, nor did they attempt through their own union constitution to seek redress.

Petitioners have had repeated opportunities to mount such a challenge to Article XII. Despite the repeated negotiations, however, the parties closest to the factual situation in the local school district have left the language intact and have six times ratified contracts in-

cluding the Article XII provision.[24] At all times pertinent thereto, including the last agreement ratified following the grant of *certiorari* by this Court, the white teachers voting for ratification, all being members of the Jackson Education Association, constituted from 80% to 86% of the union's membership.

The Jackson Board believes that the parties at the bargaining table are the parties most responsible for determining if the language contained in the Labor Agreement, which is the subject matter of this suit, is a reasonable response to past discrimination and is educationally justified. The decision was made by experienced negotiators and ratified by the teachers. The concept arose bilaterally and was not unilaterally imposed by the Board.

The continued opportunity of Petitioners to have their interests represented either through administrative proceedings or the labor grievance process makes the equitable considerations concerning third parties here clearly distinguishable from those in *Stotts* where, as Justice White noted, "neither the Union nor the nonminority employees were parties to the suit when the . . . decree was entered." 104 S. Ct. at 2584. Justice O'Connor expressed similar concerns in her concurring opinion:

> "Absent a judicial determination . . . the company . . . cannot alter the collective-bargaining agreement *without the Union's consent.*" *W.R. Grace & Co. v. Local 751*, 461 U.S. ——, —— (1983).
>
> Thus, if innocent employees are to be made to make any sacrifices in the final consent decree, *they must be represented and have had full participation rights in the negotiation process.*

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[24] September 1, 1973—August 31, 1975
September 1, 1975—August 31, 1977
September 1, 1977—August 31, 1980
September 1, 1980—August 31, 1983
September 1, 1983—August 31, 1985
September 1, 1985—August 28, 1988

104 S. Ct. at 2590 n.3 (emphasis supplied). The concerns noted by Justices O'Connor and White in *Stotts* regarding the rights of white employees who were not represented are thus wholly lacking in this case.

B. Because Article XII Involved The Voluntary Modification Of A Seniority System By The Union That Created The Prior Seniority System, The Legitimate Expectations Of Third Parties Have Not Been Upset.

In *Weber*, *Stotts*, and *Fullilove*, this Court evaluated the equities of an affirmative action program to insure that the legitimate expectations of innocent third parties were not being unnecessarily trammeled. In the case at hand, no evidence has ever been presented to suggest that the *legitimate* expectations of third parties have been upset. Neither any of the Petitioners, nor any other union member, has a legitimate expectation that the seniority provisions created through the collective bargaining process will not be modified through that same bargaining process. It is widely accepted that:

> [S]eniority rights are the creature of collective bargaining . . . what the contract confers, a later contract, validly made, may take away . . . . The notion that rights any employees . . . had under [a] contract that terminated were vested or in any other fashion sacrosanct is devoid of support in Federal labor law or contract law. . . . Seniority is not only born from the collective bargaining agreement: it does not exist apart from that contract.

Cooper v. General Motors, 651 F.2d 249, 249-51 (5th Cir. 1981).

In the same vein, this Court has ruled unanimously that it was entirely proper for a union to modify the seniority provisions of a collective bargaining agreement to give enhanced seniority to union chairpersons even though it caused the lay-off of some workers with less time at the plant. *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949). Plaintiffs in that case had tried to argue that Section 8 of the Selective Training and Service Act of 1940 disallowed such seniority alterations because the Act gave veterans seniority at the workplace they had left for the time during which they were in the military service. This Court flatly rejected the argument because unions always have the right to alter seniority provisions in good faith and "the temporary layoff of a veteran while a non-veteran chairman with less time at the plant is retained, is wholly unrelated to the veteran's absence in the service," 337 U.S. at 528-29. The Court stated, *id.* at 526:

> Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined, as they almost exclusively are, to unionized industry. See *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53 n.21. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority.[25]

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[25] *See also Local 900 IUE v. NLRB*, 727 F.2d 1184, 1189 (D.C. Cir. 1984) (permissible under NLRA to modify seniority provisions to add "layoff-and-recall superseniority" for on-the-job union officials); *Johnson v. Airline Pilots in Service of Northwest Airlines*, 650 F.2d 133, 136-37 (8th Cir.) (unions protected from complaints that timing of strikes damaged seniority and recall rights of some members), *cert. denied*, 454 U.S. 1063 (1981); *Goslowski v. Penn Central Transportation Company*, 545 F. Supp. 337 (W.D. Pa. 1982) (new contracts that caused "diminution of seniority rights" permissible when two seniority lists "dovetailed"), *aff'd mem.*, 707 F.2d 1401 (3d Cir. 1983); *Smith v. B & O Railroad Company*, 485 F. Supp. 1026, 1029 (D. Md. 1980) (merging seniority lists permissible even when it gives greater seniority rights to workers "with substantially fewer years of service" "[a]bsent a showing of fraud or hostile motivation"); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1014 (3d Cir.) ("[S]eniority differences and seniority adjustments among employee groups . . . are within the union's discretion and judgment, so long as the seniority disadvantage is not

In *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953), this Court unanimously held that in light of the broad discretion given to collective bargaining agents in devising and modifying seniority provisions, 345 U.S. at 339, and the Congressionally declared policy that "employees who left their private civilian employment to enter military service should receive seniority credit," *id.*, it was legitimate for employer and union bargaining agents to go beyond statutory provisions in granting veterans seniority credit for pre-employment military service. Although "members of [the plaintiff] class all ha[d] been laid off or furloughed from their respective employments at times and for periods when they would not have been so laid off or furloughed except for the provisions complained of in the collective bargaining agreements," the Court approved the seniority modification because it was reasonable and did not indicate that the union had failed to "make an honest effort to serve the interests of all those members without hostility to any." 345 U.S. at 337.

In approving the seniority modification in *Huffman*, the Court recognized the impossibility of devising vital provisions in a collective bargaining agreement that would not fall more harshly on some parties:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

345 U.S. at 338.

The Court in *Huffman* clearly did not intend to limit its approval to those situations where the modification of seniority was sought only to give preferences to military veterans:

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the result of arbitrary reasons . . . [and] where the distinctions were found to fall within the range of reasonableness"), *cert. denied*, 434 U.S. 837 (1977).

> It is not necessary to define here the limit to which a collective-bargaining representative may go in accepting proposals to promote the long-range social or economic welfare of those it represents. Nothing in the National Labor Relations Act, as amended, so limits the vision and action of a bargaining representative that it must disregard public policy and national security. Nor does anything in the Act compel a bargaining representative to limit seniority clauses solely to the relative length of employment of the respective employees.

345 U.S. at 342.[26] More recently, this Court expressly ruled that "[t]he elimination of discrimination *and its vestiges* is an appropriate subject of bargaining [under the NLRA]." *Emporium Capwell v. Community Organization*, 420 U.S. 50, 69 (1975) (emphasis supplied).

Where a labor organization and an employer have sought *voluntarily* to adopt provisions to address such lingering vestiges, greater latitude has been given by courts than when a court-imposed remedy is at stake. For example, in *Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976), the Court not only approved court-ordered remedies under Title VII which impinged on the seniority interests of third parties[27] because "em-

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[26] In rejecting the claim of a white railway employee that seniority provisions negotiated to benefit black employees violated his right to equal treatment by the labor organization, the court in *Pellicer v. Brotherhood of Railway & Steamship Clerks*, 217 F.2d 205, 207 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955), remarked, quoting the trial court:

> It would indeed "turn the blade inward" were this Court to hold invalid and unlawful that which appears on the face of the complaint and attached exhibits to be a good faith effort on the part of the Brotherhood and Express Company to comply with the announcements of the Supreme Court in the racial discrimination cases.

[27] While Petitioners (Br. at 11) and the Solicitor General (U.S. Br. at 28) both express a concern for the legitimate expectations of innocent parties, both also fail to mention that unlike in *Stotts*,

ployee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest," but it also emphasized:

> The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests.

424 U.S. at 778-79. *See also Weber*, 443 U.S. at 204-08.[28] The *Weber* Court also cited *Albemarle Paper Company v.*

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the modification of the seniority system in this case was voluntarily bargained and not court imposed; and that unlike in *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983), the teachers' union here voluntarily agreed to the lay-off provision and supported the Jackson Board of Education in this case. *See* Brief *Amicus Curiae* of the Jackson Education Association.

[28] The facts in the case at bar are similar to those dealt with by this Court in *Weber*. The controversy there arose from the provision of a collective bargaining agreement between the United Steelworkers of America and Kaiser Corporation, under which 50 per cent of the openings in craft training programs were reserved for blacks. Prior to this agreement, job bidding was according to strict seniority and had the impact of precluding minority promotion and transfer into more desirable job classifications. The plan negotiated in *Weber* is functionally similar to the lay-off provisions negotiated between the Jackson School Board and the Jackson Education Association in the present case. The sole difference is that the *Weber* plan affected employee seniority regarding job bidding, whereas the dispute here involves use of seniority to determine the order of staff reduction. In both *Weber* and the present case, there has been

Moody, 422 U.S. 405 (1975), in support of voluntary affirmative action between employers and unions (443 U.S. at 204):

> The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper*

---

a modification of a seniority system to protect minorities, whether in the context of job bidding or job retention.

In *Weber*, the most junior minority employees selected to enter the craft program had less seniority than white workers whose bids were rejected. Similarly, under the lay-off provisions negotiated between the Jackson School Board and the Jackson Education Association, there would be a retention of minority teachers having less seniority than white teachers who would be laid off. Despite a somewhat different factual setting in *Weber*, the underlying principle of that case—that seniority rights may be modified to achieve goals of equal employment opportunity—has equal force in the case at bar.

An essential feature of the Court's decision in *Weber* is recognition of the voluntary actions of employers and unions to combat discrimination, as opposed to the imposition of judicial remedies when the conduct of parties has been insufficient in achieving the goals of equal employment opportunity. "[S]ince the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proven violation of the act." 443 U.S. at 200. In endorsing voluntary affirmative action plans, the Court relied upon the legislative history of Title VII in concluding that the plan in *Weber* was consistent with the goal of improved employment opportunity for minorities:

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).

443 U.S. at 202.

Company v. Moody, 422 U.S. 405, 418 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.

In the case at bar, the challenged lay-off provision is but one of several provisions that have modified past seniority rights. The agreement negotiated after recognition of the Jackson Education Association contained no lay-off language; the Board therefore was not constrained to follow any particular procedure in selecting teachers for lay-off. Inverse seniority order lay-off was adopted in the second labor agreement. In 1972 the provision now in controversy was added to the contract. A further modification in 1979 inserted the concept of certification at both the elementary and secondary levels to protect special programs and institutional needs. This latter provision has had more impact on people actually laid off than any other change in this history of bargaining between these parties.

A union has wide discretion to modify the seniority provisions to which it has previously agreed, and inasmuch as the elimination of the vestiges of past discrimination is clearly a compelling national interest [29] appro-

[29] As the House Report on the 1972 amendments extending Title VII coverage to public employers such as the Jackson Board stated:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in those governmental activities which are *most visible to the minority communities* (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people is equally negated. [Emphasis supplied.]
>
> . . .
>
> Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. . . .
>
> The committee feels that discrimination in educational institutions is especially critical. *The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development.* To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. [Emphasis supplied.]

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17, 19-20, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* at 61, 77, 79-80 (Comm. Print 1972).

In his separate opinion in *Bakke*, Justice Blackmun stated:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.

438 U.S. at 407.

priate in the collective bargaining process, the indirect impact felt by some where a union and employer voluntarily, and in good faith, seek to overcome the lingering effects of past discrimination cannot be claimed to be the upsetting of any legitimate expectation or of a vested interest.

C. Article XII Is A Necessary Means To Achieve The Board Of Education's Compelling Remedial And Educational Interests.

Article XII was an appropriate means to effectuate the Jackson Board of Education's valid and substantial remedial and educational interests in recruiting and retaining minority teachers for its school system. Up to approximately the time period of *Brown I*, there had never been a single black teacher in the Jackson Public Schools. 546 F. Supp. at 1197. A past Superintendent of the system suggested that this resulted from school officials' deliberate policy of not hiring black teachers.[30] Of 80 teachers hired between 1964, the year that Title VII was enacted (al-

[30] *See* Read Dep. at 22-23.

though it did not then cover public school systems) and 1966, all were white. *See* J.A. 68-75 (1981 seniority list). By 1969 black teachers constituted only 3.9 per cent of the teaching staff. 546 F. Supp. at 1197. In the face of violation findings by the Michigan Civil Rights Commission concerning both student assignment and teacher hiring and assignment, the Jackson Board of Education established committees to begin grappling with this problem. A subcommittee of the Professional Staff Ad Hoc Committee found that minority teachers were deterred from working in Jackson because of community hostility and housing discrimination. *See supra* p. 6 n.5.

Under these circumstances, the Jackson Board of Education clearly could determine that it had a compelling need to actively recruit, hire and retain minority teachers. In the absence of a provision such as Article XII, however, any recruitment effort in the face of a declining student population would be doomed to fail.[31] Not only would a straight seniority system for layoffs immediately have depleted Jackson of the minority teachers it would have just hired,[32] but it further would make it

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[31] While Petitioners cite *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133, 1140 (5th Cir. 1981) for the proposition that students are only entitled to a "sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices," simply recruiting minority faculty members in the face of declines in student population *and* a straight seniority lay-off system would hardly be considered a "good faith effort." As stated by Chief Justice Burger in *Davis v. Board of School Commissioners of Mobile*, 402 U.S. 33, 37 (1971), "The measure of any desegregation plan is its effectiveness."

[32] Petitioners' suggestion, Pet. Br. at 31 n.27, that Article XII was of little effect in 1981, making the difference only between a systemwide minority faculty proportion of 11% and one of 13%, is misleading and erroneous. Under the collective bargaining agreement as amended in 1979, the Board of Education took certification and special class and staffing needs into account in making lay-offs, before Article XII came into play. This language protected from

impossible to continue to recruit teachers, especially minority teachers, who would hardly be willing to move long distances to Jackson, Michigan where they would face an imminent threat of lay-off.

In light, then, of the need to offer new minority faculty recruits some security, the Jackson Board of Education negotiated Article XII at the bargaining table with the teachers' representative as a compromise under which both minority and non-minority teachers would be laid off so as not to decrease the percentage of minority teachers that existed prior to the reduction in force.[33]

Lay-offs are inherently painful. As with many economic misfortunes, they often disrupt the lives of people innocent of any personal wrongdoing. The very business of unions, however, is to confront fairly, and compromise fairly, the competing interests of all of their members concerning such matters when bargaining collectively with their employer. Recognizing the impossibility of fully satisfying every individual's interest in matters as vital as these, this Court has required only that unions and employers not fail to consider individual interests for reasons that are invidious, arbitrary, or reflect hostility toward particular individuals or groups of individuals. *Vaca v. Sipes*; *Ford Motor Company v. Huffman.*

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lay-off staff members working in bilingual programs, the elementary string music program, the painting and decorating class, two of the four distributive education teachers, three music teachers, the Latin program, and special education. Thus, in the absence of Article XII, "strict seniority" would not have been followed. In fact, because of the certification provision of the contract, in the absence of Article XII the number of minority faculty in the school system would have been drastically reduced.

[33] Petitioners clearly misstate the facts when they contend that "[t]he vast majority of the teachers were opposed to racial preferences for layoffs," Pet. Br. at 7. The response to a school administrator's questionnaire on the subject, which provides the basis for Petitioners' contention, was an expression of the view of the teachers' union that the matter was appropriately one to be handled at the bargaining table. *See supra* pp. 9-10 n.9.

When an elected school board and the elected representatives of a teachers' union decide that it is necessary to modify seniority provisions to protect, for example, the quality of a school system's music department, such a decision may have the incidental impact of harming the seniority interests of non-music teachers. Such a collectively bargained-for provision would clearly be permissible because its goal would be to enhance the musical education of the students, not to invidiously disadvantage non-music teachers. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

In this case, the goal of the Jackson Board of Education has been to enhance the racial and ethnic diversity of its faculty following years of serious minority underrepresentation on its staff, caused in part by a history of past discrimination. While the accomplishment of this worthy goal may have a negative, incidental impact on the seniority interests of some non-minority teachers, the layoff provision is in no way designed to harm plaintiffs because they are white, nor does it have either the purpose or effect of stigmatizing, or implying inadequacy in any way, of any of the minority or non-minority teachers who are laid off.[34] It is therefore a permissible affirmative action measure under the fourteenth amendment.

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[34] *See United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). In an opinion joined by Justices Stevens and Rehnquist, Justice White stated:

> There is no doubt that in preparing the 1974 legislation, the State *deliberately used race in a purposeful manner. But its plan presented no racial slur or stigma with respect to whites or any race, and we discern no discrimination violative of the Fourteenth Amendment* nor any abridgement of the right to vote on account of race within the meaning of the Fifteenth Amendment.

430 U.S. at 165.

III. THE DISTRICT COURT WAS CORRECT IN DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND CORRECT IN GRANTING THE JACKSON BOARD OF EDUCATION'S MOTION FOR SUMMARY JUDGMENT.

In the procedural posture in which this case arose, the District Court was correct in denying Petitioners' motion for summary judgment under Rule 56 and in granting the Jackson Board of Education's summary judgment motion.

A. Petitioners' Summary Judgment Motion.

Petitioners could only have been entitled to summary judgment at this early stage in the litigation if no genuine issue of fact had existed concerning the constitutionality of the lay-off provision when the underlying facts were viewed in the light most favorable to the Jackson Board of Education. In order for the District Court properly to have granted petitioners' motion for summary judgment, the court would have had to hold, as a matter of law, that all voluntary, collectively bargained, race-conscious provisions adopted by a local school board amount to *per se* violations of the Constitution—regardless of the purpose and state interest motivating the voluntary adoption of the provision.

To have made such a ruling, the district court would have had to simply ignore the several decisions in which this Court based its judgments on the facts, context, purpose and governmental importance of the disputed program. *See Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); *Fullilove; Bakke.*

Petitioners *now* make several factual allegations which, if they had been proved at trial, might have lent support to their claims. However, these assertions are only con-

tentions: None of them was supported below by the required affidavits or other materials, none of them has any basis in the record before this Court, and none was ever agreed to by the Jackson Board. In fact, Petitioners never articulated a single historical fact concerning the origins of the lay-off provision, even in the 1½-page statement of facts contained in their District Court brief supporting their motion for summary judgment. Since, as we have shown above, Petitioners' categorical legal argument against race-conscious action in the absence of prior judicial findings is wrong, their mere naked contentions could not provide a basis for prevailing on their summary judgment motion, especially since they conceded the facts proferred by the Board of Education.

B. Jackson Board Of Education's Motion For Summary Judgment.

While the Jackson School Board did not produce affidavits detailing the evidence of its own prior discrimination and its adoption of institutional goals with respect to Article XII, the Board did rely, in the District Court, on the fact that Petitioners did not dispute such facts but only the inferences which could properly be drawn from them.[36] This understanding was confirmed at the oral argument before the district judge.[37] Thus, while Petitioners have sought in this Court to portray the lay-off

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[36] Once Petitioners stipulated to these facts, disposition of the Board's motion was governed by the provision of F.R. Civ. P. 56(e) which states that

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

[37] *See supra* pp. 2-3 & n.2.

provision as a response simply to past generalized societal discrimination, the Jackson Board of Education, the District Court, and the Court of Appeals correctly understood that the provision was an integral part of the Jackson Board's voluntary effort to eradicate all vestiges of its own past discriminatory conduct and to provide a fully integrated system of public schooling.[38]

At the time the cross-motions were filed at the District Court level, the Jackson Board of Education had been involved in serious efforts voluntarily to complete the integration of its school system for almost a decade. This extensive voluntary effort was due in part to a desire to avoid the divisiveness and discomfort that comes not only from prolonged litigation, but also from having to flail oneself publicly by detailing every aspect of one's own wrongdoing. Had it been necessary, however, the Jackson Board of Education stood ready to produce additional evidence of discrimination at a trial.[39]

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[38] In the statement of facts contained in the Board's brief in support of its summary judgment motion, set forth *verbatim supra* at pp. 3-15, and which District Judge Joiner described as "not disputed by plaintiffs," 546 F. Supp. at 1197, the grounds for the Board of Education's action with respect to the negotiation and adoption of Article XII are explicitly stated:

> Various complaints had been filed to the Michigan Civil Rights Commission by the Jackson NAACP alleging segregation of elementary schools as well as discriminatory treatment of minorities in *staff hiring and placement. Efforts to integrate the elementary schools and to set up increased minority hiring were prompted in part by these complaints.*
>
> . . .
>
> The leadership [of the teachers' union] explained that a staff racial mix was educationally sound and that the system needed black teachers. It was also noted that the new layoff policy was partially designed to correct past discriminatory policies.

Jackson Board of Education Brief in Support of Motion for Summary Judgment, at 1-5 (emphasis supplied).

[39] *See id.* at 35.

The Board of Education believed (as did the District Court [40] and the Court of Appeals [41]) that its summary judgment motion should be granted because the Jackson Board was acting in a remedial context in which race-conscious educational policies, such as the lay-off provision, are educationally and constitutionally sound. If dispute does exist as to the underlying facts motivating the adoption of this provision, the Jackson Board of Education still stands ready to produce more detailed evidence in a trial on remand.

The Board believes, however, that there must exist another option for a school board which wishes to eradicate all vestiges of its own past discrimination besides waiting to be sued or being forced to detail the facts of one's own past discrimination. By taking voluntary action once a valid complaint had been filed with the Michigan Civil Rights Commission, the Jackson Board of Education avoided prolonged litigation, substantial claims for back pay, and court-imposed remedies, and instead allowed the members of its own community to work out the appropriate solutions by involving citizen committees, using collective bargaining and compromise, and resting upon the forthright commitment of a duly elected local board of education. Considering the shameful legacy of recalcitrance that followed *Brown II*, and this Court's traditional deference to the decisions of local school authorities, the good-faith, voluntary use of a reasonable and properly tailored race-conscious provision by a school board should not be overturned or second-guessed where that school board presents and acts upon a plausible showing of past discrimination.[42]

[40] The District Court noted that "societal discrimination" could justify a belief by educators that it is an important and substantial government interest to have black teachers to serve as role models for students; but the District Court did not rely solely on this justification. Rather, it adopted a "reasonableness" test from *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), which asks whether the voluntary affirmative action plan is " 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation." 546 F. Supp. at 1199-1200. On the basis of this test, the lay-off provision was upheld.

[41] The Sixth Circuit found that "[t]he school board (and the bargaining representative of the teachers) have a legitimate interest in *curing the past racial isolation of black teachers in the school system concerned.*" 746 F.2d at 1157 (emphasis supplied). The Court of Appeals also stated that "the Board of Education and its bargaining agent had a legitimate interest in the *remedial* plan which was jointly adopted. Here *the school board's interests in eliminating historic discrimination*, promoting racial harmony in the community and providing role models for minority students are among the justifications available to support the layoff provisions." *Id.* (emphasis supplied).

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents pray that the judgment below be affirmed.

Respectfully submitted,

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August 23, 1985

[42] In April, 1972, the Jac. on Board of Education circulated the following statement to parents to explain its reasons for taking voluntary desegregation action:

> Waiting for what appears the inevitable only flames the passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. Many citizens know this to be true. Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.

Plaintiffs' Exhibit No. 8, *Jackson I*, question 4.

* Respondents' counsel wishes to acknowledge the substantial assistance of Gene Sperling, a 1985 graduate of Yale Law School, in the preparation of this brief.

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No. 84-1340

In The
Supreme Court of the United States
October Term, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BRZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President; and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

This Brief is submitted in reply to the Respondents' arguments, based on factual assertions drawn from their two separate Lodgings. These Lodgings were not before the Court when Petitioners' Brief was filed. Petitioners submit that Respondents' arguments erroneously seek to convert this case into something other than this employment discrimination case involving the race based layoffs of these Petitioners. Petitioners further submit that Respondents arguments are not supported by the facts of record and are contradicted by the contents of Respondents' own Lodgings.

Respondents' Lodgings consist primarily of the record before the court in the related case of *Jackson Education Association vs. Jackson Public Schools*, No. 4-72340 (E.D. Mich. 1976) [J.A. 30], hereinafter referred to as *Jackson I*. While the record in *Jackson I* was never formally submitted in its entirety to the district court below, both parties relied upon it in their motions, briefs and arguments to that court. Both parties now agree that the complete record of the proceedings in *Jackson I* is properly lodged with this Court.[1]

The record in *Jackson I* is significant because it contains the testimony of the two principal actors involved in the adoption of the racial preference (Article XII) in the 1972-73 labor contract: the then Superintendent of the school district, Dr. Lawrence Read, and the Executive Di-

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[1]In addition to the Joint Appendix and other documents of record, the record before this Court now includes a single Lodging by Petitioners and two separate Lodgings by the Respondents.

rector of the Jackson Education Association (JEA), Mr. Kirk L. Curtis.

Although the Respondents' Brief relies heavily on the record in that case, Petitioners submit that the Respondents' arguments are not supported by the record in *Jackson 1*, and indeed are contradicted by that record.[2]

I. RESPONDENTS' ARGUMENTS ARE PREMISED UPON A MISCONCEPTION OF THE RECORD EVIDENCE.

The facts advanced by Respondents in support cf their arguments are based upon a misperception of the record evidence and their own Lodgings. Respondents have also advanced arguments based upon asserted facts which do not exist in the record.

In an attempt to justify the racial preferences, and without citation to the record, Respondents contend that "in the absence of Article XII the number of minority faculty in the school system would have been *drastically reduced.*" Res. Br. at 42-43, n. 32 (emphasis added). In fact, even though there were straight seniority layoffs in 1971,

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[2]*Jackson I* was brought by minority teachers and the Jackson Education Association (JEA), when the Respondent School District refused to follow Article XII when it made layoffs in 1974-75. Although the Plaintiffs specifically alleged that the School Board's hiring practices were discriminatory to minority personnel, in violation of the Constitution and 42 U.S.C. § 1981, the District Court dismissed for lack of subject matter jurisdiction because Plaintiffs' allegations were unsupported by the evidence. [J.A. 34-35, 38.]

1972 and 1973 [Res. Lodging, Curtis, pp. 18, 47, 50],[3] the percentage of minority teachers in the district actually increased during that time.[4]

Furthermore, the Respondent School Board refused to follow Article XII for tenured teachers when it made 75 layoffs in 1974,[5] but the percentage of minority teachers in the district went from 11.1% in 1974 to 11.4% in the 1974-75 school year. [J.A. 43, 108.] Accordingly, the Respondents' argument that the percentage of minority teachers would have been "drastically reduced," has no factual support in the record and is without merit.

Moreover, based on the 1981 teacher seniority list, Petitioners have demonstrated that layoffs by seniority in 1981 would have resulted in a minority faculty percentage consistent with relevant labor market figures.[6] Re-

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[3]Because Respondents have failed to number the pages of their lodgings, Petitioners references to the lodgings will cite directly to the page numbers of the testimony or to the specific exhibit. The notation "Res. Lodging" refers to the Respondents' first Lodging.

[4]The percentage of minority faculty increased from 6.1% in 1970-71, to 7.5% in 1971-72, and to 10.1% in 1972-73. [Pet. Lodging at 56-57.]

[5]The Board issued 75 layoff notices in the spring of 1974 [J.A. 43], and recalled 56 teachers in the fall. [Pet. Lodging, p. 1.]

[6]In making this calculation from the 1981 teacher seniority list, Petitioners inadvertently used the wrong figures for the number of teacher layoffs in 1981. Although 99 teachers were given layoff notices in the spring, 64 were recalled in the fall rather than 29 as stated in the brief. [Pet. Lodging, p. 1.] The net effect is 35 layoffs instead of 70. [Id.] This hardly changes the result since removing the bottom 35 teachers from the 1981 seniority list [J.A. 57-99] results in a minority faculty proportion of 11.8% (57 of 484) rather than 11%.

spondents now claim that these figures are misleading because "[t]he Board of Education took certification and special class and staffing needs into account in making lay-offs, before Article XII came into play." Res. Br. at 41-42, n. 32. Respondents do not explain, however, how these alleged special needs affected seniority layoffs. And these special "needs," if they exist, are not supported by citation to the record.

What the record does show is that Petitioners were displaced by the racial preferences in Article XII from positions that they were fully *qualified* to teach. [App. 24a.] Moreover, in *Jackson I,* Respondents' own counsel stipulated that the *only* effect of Article XII was to create a dual seniority list:

> (Mr. Susskind): I think we can stipulate to the fact that it would create a protective list or a dual list for the purpose of layoff. *That would be the only impact on it* (emphasis added).
>
> THE COURT: That is all this case is about, is it not?
>
> (Mr. Susskind): That's right. . . .
> [Res. Lodging, Curtis, p. 49.]

In a further attempt to bolster their argument that Article XII was necessary to have adequate numbers of minority teachers, Respondents assert that:

> The union members were virtually unanimous in agreeing that there was a need for more black teachers, and *Article XII was perceived as necessary to bring that about.* . . . Res. Br. at 13, n. 12 (emphasis added).

But the Respondents' supporting reference to their own Lodging contradicts this assertion. On this point, Mr. Curtis testified:

> Q. Recognizing that I'm asking for an opinion but was there unanimity of your members as to the need for black teachers or increased recruitment of black teachers within the system?
>
> A. Virtual. Virtual unanimity for the need for that. *Now, when it came to layoff, that was another matter*

[Res. Lodging, Curtis, p. 42 (emphasis added).]

Respondents compound their error in this regard by claiming that "Petitioners clearly misstate the facts when they contend that '[t]he vast majority of the teachers were opposed to racial preferences for layoffs.'" Res. Br. at 43, n. 33. According to Respondents' own Lodging, a survey of the teachers' views in the spring of 1972 showed "overwhelming" support for the existing straight seniority layoffs, not the race based system subsequently imposed by the labor contract in Article XII.[7]

In support of their argument that the racial preference for layoffs is "reasonable," Respondents and their various amici emphasize that Article XII was a fair compromise

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[7]In response to a question by Plaintiffs' counsel, the Executive Director of the JEA, Mr. Kirk Curtis, testified to the results of the teacher survey [Res. Lodging, Curtis, pp. 28-29] as follows:

> Q. And your teachers at least, have indicated to you on layoff they preferred, 93% of them, a slight [sic] [straight] seniority system?
>
> A. Well, it was overwhelming. There was no question about the attitude of the majority of the teaching staff which I—majority, I'm talking about the white teachers.
>
> THE COURT: You did not have any difficulty persuading them how to vote?
>
> THE WITNESS: No, none at all. . . .

solution arrived at by "experienced negotiators" at the "bargaining table." Res. Br. at 33, 43. Again, the testimony in the Respondents' own Lodging flatly contradicts this premise.

According to the School Superintendent, Dr. Read, Article XII was agreed on *"sub rosa"* before the actual negotiations began. [Res. Lodging, Read, p. 33.] This is confirmed by the Executive Director of the JEA, who testified that the deal on Article XII was cut by the leaders of the union, the school administration and several black teachers' groups in the early spring of 1972. [*Id.* pp. 34-36.] According to Mr. Curtis, this secret deal was necessary "for reasons political." [*Id.* at 36.][8]

A review of the record demonstrates that there is no support for Respondents' argument that the district needed racial preferences to attract sufficient numbers of minority teachers. Without citation to the record, Respondents claim "that from an economic position, such districts

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[8]The testimony shows that the subsequent "negotiations" at the bargaining table were nothing but a charade: "The administration was going to propose their freeze system. Both of us, I think, for reasons political, had to do that. And then, you know, at that point a couple of months down the road, it was understood that we would arrive at the proportional layoff system which had been informally worked out. And that course of events took place." [Res. Lodging, Curtis, p. 36.]

And, according to Curtis, the teachers were not very happy when they found out what was in the new union contract: "Well, there were a lot of teachers who expressed their opinions that what we had done with this particular clause we had chucked their seniority down the drain. And there were some very emotional comments about the wisdom of having done that." [Id. at 41-42.]

as Kalamazoo, Grand Rapids, Detroit, and Lansing have been able to offer their teachers higher salaries and are culturally more attractive, placing Jackson at a competitive disadvantage within the in-state sub-market." Res. Br. at 18, n. 17. Again, this statement is contradicted in Respondents' own Lodging. The Second Lodging contains a Final Report of the Quality Education Subcommittee, dated June 10, 1971, stating that: "The salary schedules are good compared to other Michigan communities."[9]

Finally, Respondents have again gone completely outside the record by making the bald assertion that Petitioners made no attempt to grieve or otherwise challenge the application of Article XII through established union procedures. Res. Br. at 32. Since the record is completely silent on this point, Petitioners submit that this unsupported statement should be disregarded.[10]

II. THE RECORD CONTRADICTS RESPONDENTS' CLAIM THAT RACE BASED LAYOFFS WERE NECESSARY TO INTEGRATE THE SCHOOL SYSTEM.

Respondents' claim that the racial preferences for layoffs were an "integral part of a comprehensive volun-

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[9]Like the First Lodging, the pages of the Second Lodging are not numbered. The Final Report of the Quality Education Subcommittee is the second item in the Second Lodging, and the statement above appears at the bottom of the tenth page of that report, under the topic "Present Status."

[10]By letter dated October 10, 1985, with a copy to the Clerk of this Court, Petitioners have asked Respondents to withdraw this erroneous statement from their brief. Attached to the letter to Respondents' counsel are copies of grievances and a letter to the Union from three of the individual Petitioners protesting Article XII.

tary effort by the Jackson Board of Education to integrate its public schools." Res. Br. at 19. They also say that Article XII was adopted "as part of a *plan* to remedy prior discrimination and to achieve the educational benefits of school integration for its students." Res. Br., Argument I, p. 17 (emphasis added). But there is no support in the record for the contention that the racial layoff preferences in Article XII were part of the plan to integrate the school system or were needed for that purpose.

At the hearing before the district court below, Respondents' counsel stated.

> (Mr. Susskind): The District had voluntarily adopted a Desegregation Plan without court intervention. That was back around the start of the 1970's.
>
> Now, that Desegregation *Plan did not include* the Affirmative Action Plan which was subsequently negotiated by the Board and the union, and ratified in each successive Agreement, including the present Agreement, which is in its third year between the parties.

[Proceedings of February 23, 1982, p. 4 (emphasis added).]

Respondents now suggest that Article XII was necessary to achieve the goal of having at least two minority teachers in each elementary school by the 1972-73 school year.[11] However, Respondents' own Lodging shows that this goal was reached in the fall of 1972, without resorting to racial preferences for layoffs, by hiring special black

[11]Respondents' Brief at 8-9, n. 8, stating that: "The Board adopted that plan in March of 1972, see Read Dep. at 46, even though at that time there were still too few minority teachers in the system to meet that stated goal, Tr. *Jackson I*, at 27, and despite the fact that the minority teachers who were in the school district were particularly vulnerable to the seniority layoff rule then contained in the Board's collective bargaining agreement."

corrective reading teachers with federal funds under Title I. [Res. Lodging, Read, pp. 49, 53-54.] This was accomplished *before* the racial preferences were first applied to layoffs in the spring of the following year. [Res. Lodging, Curtis, pp. 47-48.]

Dr. Read testified extensively in *Jackson I* concerning the ongoing integration efforts, both before and after he was appointed superintendent in 1968. His testimony does not support Respondents' argument that race based layoffs were necessary to integrate the school system. According to Dr. Read, the Jackson School District had a fairly good record on integration even prior to 1968:

> I would say for the times and the attitudes generally in the country, that the efforts were better than average. I think as a consequence, Jackson was never particularly bothered by court action or threatened suits, because its general record in those years [prior to 1968] have been pretty good.

[Res. Lodging, Read p. 6.]

One example cited by Dr. Read concerned the opening of Parkside High School in 1963. When the new school opened, the school board drew attendance boundaries to ensure an appropriate mix of white and black students between the new school and Jackson High School. [*Id.*][12]

Similarly, when a new junior high school opened in 1969, the School District redrew attendance boundaries to

[12]The Amicus Brief of the Jackson Education Association makes the bald statement that "[p]rior to 1960, almost all of the black students in Jackson were assigned to a few schools within the school system. . . ." Br. at 11. There is absolutely no support in the record for this statement. Indeed, the district court below specifically noted the lack of available data on student population for the years prior to 1968. [App. 9a.]

achieve "an identical racial balance in all four junior high schools. . . ." [Respondents Lodging, Read, p.7.] This assured continued integration of all secondary schools, because the junior high schools were the "feeder" schools for the high schools. [*Id.*] Indeed, Dr. Read testified that, as of 1969: "Everything from grade 7 through 12, we had achieved about as close to a perfect racial balance in the schools as you could get." [Res. Lodging, Read, p. 12.]

While an appropriate racial balance in each elementary school was apparently more difficult to attain, the elementary schools were integrated by the 1972-73 school year.[13] There was certainly no need for racial preferences in 1981, when most of the individual Petitioners were disenfranchised of their civil rights, *See, Oliver v. Kalamazoo Board of Education,* 706 F.2d 757 (6th Cir. 1983); *Arthur v. Nyquist,* 712 F.2d 816, 822 (2nd Cir. 1983) (Any relief infringing upon teacher seniority rights must be strictly "necessary to correct constitutional violations".) Based on this record, Respondents can hardly show a need for racial layoff preferences in 1981 or at any time.

III. THERE ARE NO FINDINGS OF PAST DISCRIMINATION IN THE JACKSON SCHOOL DISTRICT.

Respondents and their various amici argue that the Jackson School Board is competent to remedy its own historic discrimination and has a constitutional duty to do so. While Petitioners do not quarrel with this proposition

[13]See, e.g., Appendix to Brief of *Amicus Jackson Education Association,* 1972-73 Table.

in the abstract, the record demonstrates that "[t]here is no history of overt past discrimination by the parties to this [labor] contract." ***Jackson Education Association v. Jackson Public Schools,*** (Jackson County Cir. Ct. 1979) [J.A. at 49.] Certainly, an employer cannot deprive innocent employees of their civil rights without any showing that there are *continuing* effects of past discrimination that must be remedied at their expense. See, *Regents of the University of California v. Bakke,* 438 U.S. 265, 299 (1978) (opinion of Powell, J.).

In attempting to show that the racial preferences have some redeeming remedial character, based on findings of discrimination, Respondents and their various amici place great emphasis on the fact that the Jackson branch of the NAACP filed a complaint with the Michigan Civil Rights Commission in March 1969.[14] While this Complaint makes a general allegation of discriminatory hiring practices, it dealt with only one school in the district. As Dr. Read explained in his testimony, "it dealt specifically with Frost Junior High School." [Res. Lodging, Read, p. 71.]

Furthermore, the complaint was resolved by a conciliation agreement. [*Id.*] The formal disposition of that Complaint specifically provides that the agreement to "adjust this matter and to take affirmative steps . . . do not represent admission[s] of unlawful discrimination on the

[14]There was only one complaint. Respondents incorrectly state that a complaint was filed in April of 1969 and incorrectly identify the complaint number as 6585. Res. Br. at 4, n. 4. The actual Complaint, No. 6485, was filed on March 24, 1969. The Complaint and Notice of Disposition are attached to the *Brief of Amicus Michigan Civil Rights Commission, Michigan Department of Civil Rights.*

part of the Jackson Board of Education *nor should they be construed as a finding of discrimination by the Michigan Civil Rights Commission.*" (Emphasis added).[15] Accordingly, the Respondents' claims "of violation findings by the Michigan Civil Rights Commission concerning both student assignment and teacher hiring and assignment . . . ," Res. Br. at 42, are completely unsupported by the record.[16]

In fact, the record in *Jackson I* contains not one finding in any of the fifteen exhibits in that case that any of the schools in the Jackson School District were unconstitutionally segregated by race. [*Jackson I*, J.A. at 36] Indeed, the Redistricting Subcommittee "asked the School Board's attorney to advise them if racial integration is legally required and, if so, to what extent."[17] The Committee's report of May 6, 1970, states that: "The District is not legally required to correct a racial imbalance in the neighborhood school system which was brought about by conditions

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[15]Attachment A, *Brief of Amicus Michigan Civil Rights Commission, Michigan Department of Civil Rights.*

[16]Of course, Respondents' assertion of "violation findings" in "teacher hiring" is directly contradicted in the pleadings: "There has been no finding of past employer discrimination in the hiring of teacher personnel on the part of the Jackson School Board, by a governmental agency competent to rule on such matters." Complaint, ¶ 21. In the Cross Motions for Summary Judgment below, this well pleaded fact was accepted by Respondents as true. [Proceedings of February 23, 1982, p. 1.]

[17]Comments by Carl L. Breeding, attached to the Redistricting Subcommittee Report of May 1970, included in the Respondents' Lodging as Exhibit 2 in *Jackson I*. The comments by Mr. Breeding are on the sixteenth page of Exhibit 2.

not created by the School Board . . . ." [Res. Lodging, attachment to Exhibit 2, p. 3.] Apparently, the School Board's integration efforts were addressing changing racial demographics and housing patterns that were outside its control.[18]

Based upon an apparently exhaustive search of the record in *Jackson I*, one of the Respondents' amici found a single statement which they claim confirms "the existence of findings by the Board of Education that the School District was segregated. . . ."[19] The statement referred to is contained in a series of questions and answers distributed to concerned citizens. But when read in context, the answer to the question referred to simply says that segregation is illegal, which can hardly be construed as a specific finding of discrimination by any entity.[20]

In short, the Respondent Jackson School Board has not made findings of any prior discrimination in the Jack-

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[18]Consistent with the court's finding of "societal discrimination" in *Jackson Education Association v. Jackson Public Schools*, No. 77-011484 CZ (Jackson County Cir. Ct. 1979), [J.A. 39], a position paper by Carl L. Breeding attached to the subcommittee's Report states that integrating the Jackson Public Schools can only be accomplished by changing housing patterns: "Bringing about school integration rests on a far harder barrier to surmount than law—the *housing pattern* which for the most part keeps blacks in one set of schools and whites in another. Obviously, housing patterns are not going to change appreciably in a short time" (emphasis added). [Res. Lodging, attachment to Exhibit 2.]

[19]*Brief of the Lawyers Committee for Civil Rights Under Law and the American Civil Liberties Union, p. 3 n. 3.*

[20]The statement says that the right to attend a neighborhood school is "often disregarded for such reasons as special education, overcrowding, special programs, and certainly, when it is illegal as in the case of perpetuating racially isolated schools." [Res. Lodging, Information Circulated to Jackson Citizens, April 10, 1972, Concerning School Integration Efforts, Plaintiffs' Exhibit 8, answer to question 7.]

son Public Schools.[21] Indeed, Respondents *concede* the point by emphasizing "possible prior discrimination" Res. Br. at 30, or "a plausible showing of past discrimination." Res. Br. at 42.

Therefore, there is nothing to support the explicit use of race apart from the labor contract itself. By its express terms, the labor contract requires the existing percentages of minority faculty to be maintained during layoff until there is proportional representation between the faculty and student body populations. [J.A. 13, 15.] This is nothing but a naked preference based on race without any limitation as to time, scope or effect; and is devoid of any procedural safeguards or standards for periodic re-evalu-

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[21]The Amicus Brief of the Jackson Education Association asserts that the "[t]estimony of the school superintendent shows that school officials believed that federal laws *required* these measures to desegregate the schools." JEA Brief at 15 (emphasis added). In support of this statement, they refer to the testimony of Dr. Read at pages 65-68. But Dr. Read was referring to his personal opinion that the racial preference for teacher layoffs was consistent with federal law, not that racial preferences were *required* to desegregate the school system.

Dr. Read stated that "[w]e weren't trying to do anything illegal, because there is a clause in the contract that says if anything is in conflict with the statutes of the Federal government or the State of Michigan, that the statutes would prevail." [Res. Lodging, Read, p. 67.] Dr. Read believed that Article XII would prevail because "the activist position of the courts at that time in finding in favor of minority group rights, we felt that if indeed the courts ever had to make a decision, that the Federal regulations governing equal treatment, and particularly the treatment of minority groups, probably would prevail over the State Tenure Law." [*Id.*] (The Michigan Teacher Tenure Act, MCLA 38.105 *et. seq.* would otherwise require layoffs by straight seniority.) [J.A. 44.]

ations of the "need" for the preferences.[22] As such, this explicit use of race cannot stand. "Absent findings of past discrimination by a competent body, courts cannot ascertain that the purpose of the affirmation action program is legitimate." *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir. 1981) (Upholding preferential hiring plan of *limited* duration based on judicial *and* administrative findings of discrimination.) *See* also, *Janowiak v. Corporate City of South Bend,* 750 F.2d 557 (7th Cir. 1984) (Preferential affirmative action plan could not be justified by mere findings of a statistical disparity, which was insufficient to prove past discrimination.)

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[22]The *Brief Of Amici Curiae Lawyers' Committee For Civil Rights Under Law, et al.,* contends that Article XII "has been reviewed several times since its adoption in 1972, and it is again subject to renegotiation in 1988 when the current collective bargaining agreement expires." Br. at 14. No record reference is cited for this assertion. The record shows that the Respondent School Board proposed deleting Article XII from the labor contract in 1973, but the Union insisted that it remain in the agreement. [Res. Lodging, Curtis, pp. 50-51.] Apparently, Article XII has never been reviewed since that time. According to Respondents, the Union has never proposed its deletion from the contract. Respondents' *Brief In Opposition To Petition For Writ Of Certiorari,* p. 1.

CONCLUSION

Respondents have attempted to characterize the record to suit their arguments that the race based layoffs of Petitioners were reasonable and necessary. Contrary to Respondents' assertions, there are no findings of discrimination in the record. The race based layoffs of these Petitioners were imposed without any remedial justification, and the judgment below must be reversed and the case remanded for further proceedings consistent with Petitioners' rights to equal protection of the laws.

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No. 84-1340

In The
Supreme Court of the United States
October Term, 1984

WENDY WYGANT; SUSAN LAMSON; JOHN KRENKEL; KAREN SMITH; SUSAN DIEBOLD; DEBORAH BREZEZINSKI; CHERYL ZASKI; and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, JACKSON, MICHIGAN; RICHARD SUNBROOK, President; DON PENSON; ROBERT MOLES; MELVIN HARRIS; CECELIA FIERY; SADIE BARHAM; and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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No. 84-1340

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JACKSON BOARD OF EDUCATION, JACKSON, MICHIGAN; RICHARD SUNBROOK, President; DON PENSON; ROBERT MOLES; MELVIN HARRIS; CECELIA FIERY; SADIE BARHAM; and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in several cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in light of the erroneous holding of the Sixth Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 746 F.2d 1152 (6th Cir. 1984).

STATEMENT OF THE CASE

This case presents the issue whether the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States tolerates racial preferences

in teacher layoffs when adopted by a public employer in the absence of findings of past discrimination. The case raises the further question whether such racial preferences may be based solely upon a disparity between the respective percentages of minority faculty and students.

The policy at issue was adopted in a collective bargaining agreement between the Board of Education of the City of Jackson, Michigan, and the Jackson Teachers' Association. It provides first a policy goal to have at least the same percentage of minority racial representation in the schools' faculty as is represented by the student population. Second, it provides that teacher layoffs will be conducted by seniority principles except that at no time may a greater percentage of minority personnel be laid off than the current percentage of minority personnel employed. *Wygant*, 746 F.2d at 1158.

The suit was brought by nonminority school personnel who contend that these provisions violate the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. §§ 1981, 1983, and 1985. The nonminority teachers argued below that an employer and a union cannot lawfully negotiate a voluntary affirmative action plan which gives preferential treatment to minorities where there have been no judicial findings of past employer discrimination. In other words, societal discrimination, as opposed to identifiable employer discrimination, is not a lawful basis for the adoption of a voluntary affirmative action plan. *Wygant*, 746 F.2d at 1154.

The lower courts rejected this argument and adopted a requirement of determining whether there is a sound

basis for concluding that minority underrepresentation is substantial and is impeding access and promotion of minorities. *Id.* at 1155. The lower courts further held that it was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination; it was held to be enough that each recipient is within a general class of persons likely to have been the victims of discrimination. *Id.*

SUMMARY OF ARGUMENT

This case presents a portion of the question left unresolved in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), and *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 81 L. Ed. 2d 483 (1984). It involves the issue of whether an affirmative action plan, enacted by a governmental entity, that grants racially based preferences violates the Fourteenth Amendment to the United States Constitution and the Federal Civil Rights Act. Pacific Legal Foundation believes that the key to the validity of such affirmative action plans lies in the adequacy of the findings necessary to support the plan. Only a finding of racially based discrimination can support a racially conscious remedy. Absent a finding of racially based discrimination, a governmentally imposed racial preference is clearly an arbitrary and capricious act and itself constitutes invidious discrimination.

The findings necessary to support an affirmative action plan must clearly demonstrate discrimination. A mere statistical disparity has never been held sufficient by this Court and, furthermore, such statistical evidence

must be relevant and must clearly define the nature of the discrimination. The Fourteenth Amendment protects individual rights and does not countenance group preference merely to obtain racial balance.

ARGUMENT

I

ADEQUATE FINDINGS OF IDENTIFIED DISCRIMINATION MUST BE ARTICULATED PRIOR TO THE IMPOSITION OF A RACIALLY CONSCIOUS REMEDY

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is clear that school district bargaining agreements are state action for the purposes of this amendment. *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).

This Court has traditionally repudiated distinctions between citizens solely because of their ancestry as being "'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Regents of the University of California v. Bakke,* 438 U.S. 265, 294 (1978), quoting *Loving v. Virginia,* 388 U.S. 1, 11, 18 (1967), and *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). Therefore, a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification, *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 272 (1979), and the sources of the justification must rest in the discrimination sought to be corrected by the classification.

If no discrimination requiring correction exists, amicus submits that a preferential affirmative action plan enacted by a governmental entity becomes racial discrimination outlawed by the Fourteenth Amendment.

As this Court held in *In re Griffiths,* 413 U.S. 717, 721 n.8 (1973): "Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." And more specifically, "quotas merely to attain racial balance are forbidden." *United States v. Wood, Wire and Metal Lathers International Union, Local Union No. 46,* 471 F.2d 408, 413 (2d Cir. 1973). Yet it is precisely an arbitrary racial balance based on the percentage of students that the Board of Education has imposed on its faculty.

The divergent opinions of this Court in *Regents of the University of California v. Bakke,* 438 U.S. 265, *Fullilove v. Klutznick,* 448 U.S. 448 (1980), and their progeny indicate that the Court has not yet determined what is the appropriate standard of review for racially conscious affirmative action plans. But this Court has never approved race conscious remedies in the absence of judicial, administrative, or legislative findings of discrimination in violation of the Constitution or statutes. *Fullilove v. Klutznick,* 448 U.S. at 497 (Powell, J.); *Regents of the University of California v. Bakke,* 438 U.S. at 307 (Powell, J.). The existence of findings of illegal discrimination is therefore a precondition to the adoption of a preferential affirmative action plan.

Because of the danger that preferential plans may violate the constitutional rights of the nonpreferred classifications, such plans must contain some protections to

ensure that the application of the racial criteria will be limited to accomplishing the remedial objectives of the plan as well as to ensure that misapplications of the plan will be promptly and adequately remedied. *See Fullilove v. Klutznick,* 448 U.S. at 487. The objectives are directly founded upon the scope of the identified discrimination and the safeguards in the plan must thus be derived from a studied consideration of the findings.

A governmental entity cannot, therefore, develop a racially conscious affirmative action plan without first establishing findings that clearly define the scope and duration of the discrimination sought to be remedied. The entity cannot determine the recipients of the preference nor the extent of the remedy without such findings. Nor can the governmental entity devise adequate safeguards to protect the rights of those disfavored by the classifications without defining the extent of the discrimination. A court reviewing a preferential plan cannot perform the detailed analysis necessary to determine if the plan is permissible unless it is presented with the detailed findings that prompted the adoption of the plan.

II

A COURT MUST EVALUATE ALL THE FINDINGS WHEN REVIEWING A RACIALLY CONSCIOUS AFFIRMATIVE ACTION PLAN

The District Court relied on a disparity between the percentage of minority teachers and students in the Jackson school system to justify the preferential seniority provision. *Wygant,* 746 F.2d at 1156. The key issue before this Court is whether that statistical disparity identified and described the problem sufficiently to warrant the remedy selected.

This Court has stated that "[s]tatistics are . . . competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety, and like any other kind of evidence, they may be rebutted. In short, their usefulness depends on *all of the surrounding facts and circumstances.*" *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339-40 (1977) (emphasis added). This caveat demonstrates that this Court is fully aware of the dangers of relying on mere statistics to support a purported finding of discrimination and is indicative of the necessity of evaluating all the findings in reviewing an affirmative action plan. The retrospective view that a reviewing court must take in evaluating plans creates the possibility that the court may attempt to examine the findings in light of the plan adopted rather than to review the plan as emanating from the findings.

The lower courts in this case evaluated the single statistic that during the period deemed relevant, the percentage of minority teachers grew from 3.9% to 8.8% while the percentage of minority students grew from 15.2% to 15.9%. *Wygant,* 746 F.2d at 1156. These statistics, however, also demonstrate that between 1968 and 1972, the percentage of minority teachers increased over 125% while the percentage of minority students increased a mere 5% and indicate that the disparity had been decreasing substantially over time. When viewed in light of this "circumstance," the lower courts' conclusion of "substantial" and "chronic" underrepresentation seems unfounded.

Amicus uses this quasi-statistical analysis merely to demonstrate that a simplistic reliance on some of the findings cannot and should not suffice to validate a preferential affirmative action plan. The findings must be a starting point for the development of the remedy and not as mere rhetoric to justify a remedy; neither can the extent of a racially conscious remedy define the quantity or quality of the findings to be selected to support the remedy.

As this Court specifically held in *Hazelwood School District v. United States,* 433 U.S. 299, 308 (1977):

> "There can be no doubt . . . that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." (Footnote omitted.)

Here, unfortunately, the Court of Appeals failed to follow the guidelines set forth by this Court in *Hazelwood. See Wygant,* 746 F.2d at 1156 n.1. The Court of Appeals also rejected the guidance of this Court in *Firefighters v. Stotts,* 81 L.Ed.2d 483. *See Wygant,* 746 F.2d at 1157, 1159. *Stotts* held that the use of a racially based quota as a device to protect those who have suffered legal injury is appropriate only where the persons who have been injured by the past discrimination would in fact benefit from the quota. *Stotts,* 81 L.Ed.2d at 499. But here, not only were such safeguards lacking, there was no showing of discrimination to begin with. The Jackson Board

of Education and the lower courts thus committed a double-barreled error.

It is unfortunate that in a desire to create its vision of educational utopia which eliminates historic discrimination, promotes racial harmony, and provides role models for minority students, *Wygant,* 746 F.2d at 1157, the Board of Education fell into the trap of itself discriminating on the basis of race. It is even more unfortunate that the lower courts embraced such rationalizations in lieu of the law set down in *Stotts* and *Hazelwood.* The fatal flaw in too many affirmative action plans is the promotion of class privileges at the expense of individual rights. This Court held in *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948): "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." (Footnote omitted.)

This Court has also declared: "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers." *Mitchell v. United States,* 313 U.S. 80, 97 (1941).

This is the view that must be taken of the Fourteenth Amendment, for discrimination is always personal and individual to the person who suffers it. It is of no consolation to that person to know that his or her race as a whole may or may not have been subject to deprivations at other times in other places. What the individual of any race demands and deserves is equal protection from discrimination, here and now.

———o———

CONCLUSION

In *Plessy v. Ferguson,* 163 U.S. 537 (1896), the State of Louisiana enacted a statute providing for separate railway carriages for black and white passengers. In upholding this pernicious arrangement, the Supreme Court accepted the doctrine of "separate but equal" accommodation on the basis of race. In dissent, Justice Harlan made his famous declaration: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559. That the complexion of the favored classes may change does not make "separate but equal," any more acceptable to the Constitution or the Civil Rights Act. As *Brown v. Board of Education of Topeka* held, separate but equal has no place in our society because separate accommodations are inherently unequal. 347 U.S. 483, 495 (1954). This rule applies to the segregation of teachers by race as much as it does to students.

Because the findings of faculty/student disparity were not adequate to demonstrate a pattern of ongoing discrimination sufficient to warrant a racially conscious remedy, amicus Pacific Legal Foundation urges that the decision of the Sixth Circuit be reversed.

DATED: June, 1985.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WENDY WYGANT, ET AL,
Petitioners,

v

JACKSON BOARD OF EDUCATION, ET AL,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE MICHIGAN STATE POLICE TROOPERS ASSOCIATION, INC.

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BRIEF AMICUS CURIAE OF THE MICHIGAN STATE POLICE TROOPERS ASSOCIATION, INC.

With the written consent of the attorneys for the parties, the Michigan State Police Troopers Association, Inc. respectfully submits this Brief as Amicus Curiae.[1]

INTEREST OF AMICUS CURIAE

The Michigan State Police Troopers Association, Inc. (the MSPTA) is a nonprofit Michigan corporation, having its principal place of business in Lansing, Michigan. The MSPTA has been certified as the exclusive collective bargaining representative of all troopers and sergeants in the Michigan Department of State Police, in accordance with provisions of Article 11, Section 5 of the Michigan Constitu-

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[1] Amicus has filed the consents of the attorneys for the parties with the Clerk of the Court.

tion of 1963. The MSPTA represents approximately 1,750 troopers and sergeants in the Department of State Police. Among those police officers represented by the MSPTA, 60 are women, 113 are black, and 40 are of Hispanic origin.

In its most recent collective bargaining agreement with the Michigan Department of State Police (and at the adamant insistence of the Department), the MSPTA agreed to a contract provision regarding layoffs which is nearly identical to the provision currently before the Court.[2] The labor contract allows the Department of State Police to deviate from out-of-line seniority in laying off and recalling personnel in order to maintain the same percentages of persons in "underutilized categories[3]" as existed immediately prior to the layoff.

In addition, the police officers represented by the MSPTA, as well as all State employees in Michigan, are currently subject to a directive from the Michigan Equal Employment and Business Opportunity Council (MEEBOC)[4] that all hiring and promotions within Michigan state government shall occur at a rate of two persons in underutilized categories for every white male hired or promoted until the percentages of underutilized persons equals certain goals established by MEEBOC, or until the directive expires or is replaced by a new directive. This is not a court

[2] Relevant portions are reproduced in Appendix 1.

[3] Although the federal and state civil rights laws protect a variety of immutable characteristics from being grounds for employment discrimination, affirmative action is most often aimed at assisting blacks, women, Hispanics, and American Indians. Affirmative action to assist handicappers is also increasing. Hereafter, the terms "underutilized category" or "minority group member" should be construed as referring to persons possessing characteristics which are the focus of an affirmative action plan or program.

[4] MEEBOC was created in its present form by gubernatorial Executive Order 1983-4 as an advisory body to Michigan's governor. It has no statutory or constitutional authority. It has assumed an active role in overseeing the state civil service, particularly its hiring and promotional practices.

ordered plan or part of a consent decree, but an effort undertaken by MEEBOC to create statistical parity between the state civil service work force and the available labor pool in Michigan.[5]

The MSPTA is directly impacted by each of the described "affirmative action" procedures. It has recently found itself an unwilling participant in a battle over the legality of what is euphemistically referred to as "affirmative action," but what is undeniably reverse discrimination. It has been accused of being an accomplice by virtue of its agreeing to the contract language regarding layoffs and recall. Its white male members have demanded that the MSPTA insure that they are treated equally (not worse) than persons in underutilized categories. This seems like a most reasonable request. On the other hand, its minority members have made the countervailing demand that the MPSTA protect their interests and oppose the efforts of those who would dismantle affirmative action or interfere with their promotions made under an affirmative action plan. Assuming such plans pass statutory and constitutional muster, these requests are equally reasonable.

The MSPTA, like other public sector labor unions throughout the country, is caught in an untenable position. The controversy surrounding the legality of reverse discrimination threatens to factionalize the Association. The MSPTA is requesting this Court to address and answer the practical problems which have been created, not only for employers and employees, but for public sector unions, as a result of the blurred distinctions between legitimate affirmative action and illegal reverse discrimination. This case provides an ideal vehicle for the Court to do so.

[5] Excerpts from the directive are set forth in Appendix 2. The directive was prompted by "early retirement" legislation which was passed by the Michigan legislature in 1984.

INTRODUCTION

For reasons which are unclear, the Jackson Education Association was apparently not sued by Petitioners in this case. The MSPTA is appearing as an amicus curiae to request the Court to consider and address the problems confronted by all public sector unions, including the Jackson Education Association and the MSPTA, who cooperate (or refuse to cooperate) with an employer's affirmative action efforts. The MPSTA recognizes that this Court will not directly pass judgment on the propriety of any action of a non-party to this case, including the Jackson Education Association. However, the Court's disposition of the issues raised by Petitioners, the MSPTA submits, will necessarily affect public sector labor unions in a profound manner. It is hoped that the Court will use this case to settle as much of the affirmative action controversy as possible. Hopefully, amicus can alert the Court to some tangential issues that might otherwise be obscured since the Jackson Education Association is not a party in the case.

Furthermore, the parties and other amicus curiae will provide the Court with an abundance of citations and authorities to substantiate their positions. The purpose of this brief is not to reiterate the case law or persuade the Court to adopt a particular position, but to give the Court a perspective of the issue from a public sector union's point of view, which is not adequately represented in the case due to the absence of the Jackson Education Association as a party.

The MSPTA has diligently attempted to represent the legitimate employment expectations of all of its members since it was founded in 1964, but has come under increasing attack recently from members who demand its intervention because of claims that employment decisions have been made by the Michigan Department of State Police solely on the basis of race, sex, or national origin.

As indicated, the MSPTA has agreed to a collective bargaining agreement nearly identical to that in the case presently before the Court which freezes the proportion of

minorities in the Michigan State Police work force in the event of a layoff. Since the provision became effective, the Department of State Police has been fortunate in avoiding the need to reduce its work force by laying off employees. However, the Department has had to lay off employees in the recent past. Hence, the MSPTA has escaped the possibility that it will be made a litigant arising out of its agreement to allow the Department of State Police to consider race, sex, and national origin to determine who will be laid off. Nevertheless, this provision in the collective bargaining agreement remains a very controversial topic among the rank and file of the MSPTA.

In addition, as is discussed elsewhere in this brief, the State of Michigan has imposed a controversial promotion quota upon the Department of State Police and all other departments within the classified civil service of the State of Michigan. The quota requires that two minority persons be promoted[6] for every white male until the percentage of minorities in state government reach stated goals or until the directive expires. The MSPTA (as well as other state employee labor organizations) has been beset with internal discord and strife as a result of the "two for one" promotion policy. White male officers with scores of 99 on the promotional roster scream "discrimination" when they see blacks and women with scores in the low 80s promoted over them. (While promotions were formerly made on the basis of narrow score bands in the Michigan classified civil service, minority group members with promotional scores of 80 or above are now deemed as "qualified" as a white male with a score as much as 20 points higher.) These officers have demanded legal representation and financial assistance from the MSPTA, insisting that the promotions are not consistent with the type of affirmative action that this Court has previously held to be valid. On the other hand, the black and women officers also seek help from the MSPTA to fend off the legal attacks brought by their white male brethren, who are increasingly resorting to the use of private lawyers and

[6] Promotions are specifically excluded as a collective bargaining topic for troopers and sergeants of the Michigan State Police by the Michigan Constitution of 1963, art 11, § 5, which is set forth in Appendix 3.

the courts in attempts to enjoin "affirmative action" promotions. (At least one Michigan court has already enjoined the promotion of lower scoring black officers in favor of a white sergeant with a higher score. More suits have been threatened.)

The MSPTA finds itself caught between divergent interests, not unlike a very large number of public sector labor associations throughout the nation. On the one hand, the MSPTA leadership is commited to equal employment opportunity and to eliminating the effects of past societal discrimination. On the other hand, the MSPTA has striven for absolute fairness and objectivity in employment decisions within the Michigan Department of State Police. All forms of discrimination are deplored, whether perpetuated upon blacks, women, or white males.

The problems confronted by the MSPTA in the context of affirmative action/reverse discrimination are due to the uncertainty in this area of the law. Two major issues need final judicial resolution by this Court to protect unions and employes who act in good faith:

(1) If explicit racial and sexual discrimination by government employers is ever constitutionally permissible, guidance from this Court is necessary to clarify exactly when and under what circumstances this may occur. Although prior decisions of this Court have only approved certain narrow forms of affirmative action, the only real prerequisite the lower courts seem to require in practice is demographic statistical imbalance between the work force and the labor pool.

(2) Assuming that racial- and sex-determinative employment decisions by public employers are constitutional in limited circumstances, the legitimate roles and responsibilities of public sector unions as they relate to affirmative action must be clarified. Unions must be free to negotiate conditions of employment and to oppose what they perceive to be unlawful employment practices without fear of being accused of breaching the duty of fair representation to the group adversely affected by its position.

IF RACE- AND SEX-DETERMINATIVE EMPLOYMENT DECISIONS ARE CONSTITUTIONAL, CONCISE STANDARDS MUST BE ADOPTED TO PREVENT OVERREACHING

Affirmative action has undergone a major evolution since this Court first approved the consideration of race, sex or national origin under very limited circumstances in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Mr. Justice Powell's controlling opinion in that case would have allowed a government to consider race as one criteria for admission to medical school when it could demonstrate that to do so promoted a substantial state interest (Opinion of J. Powell at 438 U.S. 320). Five members of the Court, however, flatly rejected the concept of racial quotas, at least insofar as it would preclude an individual from participating in a federally funded program solely on account of race.

Today, of course, the governmental work place from Maine to Alaska is replete with demographic quotas adopted under the auspices of affirmative action. In most instances, the governmental employer is insulated from Title VII liability by Section 713(b)(1) of the Act, due to the promulgation of liberal, but vague, affirmative action guidelines by the EEOC.[7] A governmental agency can compare the demographics of its own work force to the population at large, the available work force, or some other group, depending upon the result it wishes to reach, and conclude that a statistical disparity exists, suggesting past or present discrimination. A "temporary"[8] affirmative action plan may then be put into place which requires the hiring, promotion, training, or layoff of a certain number of persons on the basis of their race, sex or national origin. Although prior cases and even the EEOC emphasize that affirmative action

[7] 29 C.F.R. Part 1608.

[8] All affirmative action plans can be considered temporary because they expire by their own terms when a demographic goal in the work force is reached. Depending upon individual employers' work force transiency, identical plans may be in place for 6 months or 20 years!

plans must be "reasonable", reasonable is whatever the government employer says it is. Plans requiring one minority promotion for every two majority promotions are common; one for one plans are increasingly used; however, Michigan State government has now adopted a "two for one" plan, which is believed to be the highest voluntary affirmative action quota in the country. It is not surprising that Michigan furnishes the case which it is hoped will be this Court's most important and decisive pronouncement on the subject of affirmative action.

The Michigan Constitution has prohibited racial discrimination in the state civil service since 1940.[9] Michigan has also had a comprehensive statute prohibiting discrimination based on race, sex and national origin since 1955.[10] Notwithstanding the existence of these protections against discrimination in state government for over 30 years, Michigan concluded in 1984 that 66% of all future civil service positions should go to persons in underutilized categories until demographic balance is achieved or until the plan expired. Michigan has undertaken this quota, not because it has concluded that intentional discrimination has existed in state government, but to rectify injustices perpetuated upon minorities by our society in the past, as well as to insure their increased participation in government:

> It is well settled by the courts that affirmative use of race and gender conscious employment goals to alleviate the underutilization of protected groups is not violative of federal or state law or of the Michigan or Federal Constitutions. The purpose and effect of the adopted procedures is to overcome the present consequences of past discrimination against women, minorities and handicappers as a group and to assure equal participation of

[9] MICH. CONST. of 1908, art. VI, § 22; MICH. CONST. of 1963, art XI, § 5.

[10] Fair Employment Practices Act, 1955 Mich. Pub. Acts 251; Elliott-Larsen Civil Rights Act, 1976 Mich. Pub. Acts 453.

> women, minorities and handicappers in state government.[11]

This Court must be aware that state and local governments have construed *Bakke*[12] and *Weber*[13] to allow reverse discrimination without restriction so long as the goal of the discrimination is to create a civil service work force that mirrors the characteristics of the available work force in the general population, or in the alternative, seeks to remedy past societal injustices to particular groups. *That is the reality of affirmative action programs in 1985.*

The MSPTA is not suggesting that this Court abolish all types of race- or sex-determinative employment decisions. On the contrary, the MSPTA recognizes the value of affirmative action in the recruitment of qualified persons in underutilized categories to compete equally with all candidates for positions in state or local government. The MSPTA appears as amicus curiae to urge this Court to adopt clear and unequivocal standards for determining if and when a governmental employer may make race- or sex-determinative employment decisions and to what extent.

The standards which have been developed by the lower courts in response to *Bakke* and *Weber* are subject to manipulation and vagaries in application; furthermore, they can be used to validate virtually any affirmative action plan which seeks simply to have an employer's work force mirror the local labor force. The test which has been distilled from this Court's prior decisions has been stated to be the following:

> The courts in post-*Weber* decisions generally have upheld action taken pursuant to a formal affirmative action plan against claims of reverse discrimination

[11] Memoranda from Lt. Governor Martha Griffiths to Michigan Agencies and Departments (May 21, 1984).

[12] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[13] *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

where the plan (1) is remedial (i.e., in response to a conspicuous racial imbalance in the employer's work force or a finding of discrimination); (2) is reasonably related to the remedial purpose; (3) does not unnecessarily trammel the interests of white employees; and (4) does not continue beyond a period reasonably required to eliminate the conspicuous imbalance or correct the discrimination. Schlei and Grosman, *Employment Discrimination Law* (2d ed., 1983); BNA, ch. 24, p. 854.

This test is a virtual tautology which can be used to justify *any* sex or racial preference made in the name of affirmative action: (1) If the employer's work force does not closely mirror the available labor force in the local population, a "conspicuous imbalance" may be said to exist, thus automatically making the plan "remedial". (2) Any affirmative action plan that raises the percentage of underutilized persons in the employer's work force must be found "reasonably related" to the remedial purpose. (3) If the lay off of white males with high seniority in favor of new hires who are predominantly members of underutilized categories does not "unnecessarily trammel" the interests of the white employees, it is hard to imagine that any activity undertaken in the name of affirmative action would ever be found to unnecessarily trammel the interest of white male employees. (4) Since no proponent of affirmative action has argued that persons in heretofore underutilized categories in government employment should *exceed* their proportion in the relevant population, this prong of the test becomes meaningless.

If this Court is to constitutionally sanction explicit acts of racial discrimination by government employers, the permissible boundaries of this activity must be unmistakably clear. They must not be allowed to shift and change with every new presidential or gubernatorial administration. They must be susceptible to judicial analysis that will yield similar results in federal district courts and state courts across the nation. Terms which cannot be quantified, such as "reasonable" and "unnecessarily trammel", should be avoided, if possible, for such terms can be assigned a meaning that is result-oriented. Just as this Court has been meticulous in defining the legal parameters of capital punishment, no doubt because of the gravity of the consequences, so too must the Court approach the problem posed by this case. If racial and sexual discrimination by government is constitutional because it is remedial of past societal wrongs, the harshness of the remedy requires, at the very least, the strictest and clearest of standards to prevent overreaching and abuse by the government in its day-to-day application.

AFFIRMATIVE ACTION AND THE UNION'S DUTY OF FAIR REPRESENTATION

One would expect that a labor union which vigorously opposed any type of preference with respect to promotions and layoffs of members in the bargaining unit on the basis of their race or sex would be acting within its lawful authority (particularly if no identifiable victims of illegal discrimination were in the bargaining unit). This is a decision, however, that may be quite contrary to the best interests of the union's minority members. Based upon the prevalence and judicial acceptance of affirmative action in the public sector, the decision might be successfully attacked as breaching the union's duty to fairly represent those minority members. See *N.A.A.C.P. v. Detroit Police Officers Assoc.*, 591 F. Supp. 1194 (E.D. Mich. 1984), discussed *infra*.

Conversely, the Jackson Education Association and the MSPTA have both contractually agreed to employment preferences for minority group members, notwithstanding the absence of any finding of intentional discrimination by the employer or existence of any identifiable victims of discrimination. The two unions have clearly granted a preference to their minority group members on the basis of race, sex and national origin, thus presenting an arguable case of a breach of the duty of fair representation to those white employees whose seniority would have otherwise protected them from

layoff. Absent compelling reasons that survive Fourteenth Amendment scrutiny, the unions may be found equally as liable as the employers in depriving these persons of the equal protection of the law, notwithstanding the laudable motives of the unions.[14]

What standards are to be used to determine if and when a union may turn its back on the will of the majority of its members and agree to a contract provision which it is not legally required to accept, but which it may believe is morally appropriate? Conversely, when is a union free to oppose race- and sex-determinative employment decisions adopted by the employer because they are inappropriate and a form of illegal discrimination? The answers are not provided by existing law!

A related and equally important question is whether a union which sincerely believes that an affirmative action plan affecting its membership exceeds the legal parameters established by this Court may use union dues or agency shop fees to finance litigation challenging such a plan. The Detroit Police Officers Association (DPOA) was recently found to have breached its duty of fair representation to minority group members in just such a case. (In fact, the union's appearance as an amicus curiae in other cases opposing affirmative action despite the objection of its minority members was strongly criticized by the Court.) *N.A.A.C.P. v. Detroit Police Officers Assoc.*, 591 F. Supp. 1194 (E.D. Mich. 1984). District Judge Horace Gilmore rebuked the DPOA for its overall attitude toward affirmative action, and ordered the union to take several internal steps to protect its minority members and insure that they would assume a greater future role in the union.

The result in the *N.A.A.C.P. v. D.P.O.A.* case has paralyzed public sector unions because of the potential con-

[14] See *Lyon v. Temple Univ.*, 543 F. Supp. 1372 (E.D. Pa., 1982) (union could be held liable under § 1983 for affirmative action provisions of collective bargaining agreement allegedly discriminatory to males).

sequences of becoming involved, one way or the other, in the affirmative action controversy. Few subjects, however, are more closely related to "terms and conditions of employment" than promotions and layoffs. It is an intolerable situation when public sector unions become hesitant to act in areas which should be among their foremost concerns. The clear guidance of this Court is needed to restore the confidence of the nation's public sector unions to negotiate without hesitation for what they believe to be in the best interest of their members.

Compounding the problem which public sector unions face is the reaction of many public employers to *Griggs v. Duke Power Co.*, 404 U.S. 424 (1971), and *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Civil service systems across the country had used competitive examinations as a basis for hiring and promoting employees, at least until it became evident that Title VII liability lurked behind the use of such tests if they adversely impacted upon minority applicants and were found not to be job-related. In Michigan, civil service appointments and promotions are constitutionally required to be determined on the basis of competitive examinations and performance. The Michigan response to the problem has not been atypical. Instead of restructuring entrance and promotional tests to eliminate perceived cultural bias, the band of qualified scores has simply been expanded whenever needed until it includes sufficient minorities or women to allow affirmative action appointments to be made.

For example, the Michigan Department of State Police uses a single promotion list for all troopers who are candidates for promotion to the rank of sergeant. White males are uniformly selected on the basis of their competitive scores, with the highest scores being exhausted before lower scores are used. Minorities and women, however, are eligible for promotion so long as they receive a minimum score of 80 (out of a possible 100). Hence, it is not uncommon for a black male or a woman with a score in the 80s to be pro-

moted over a hundred white males with scores in the 90s. A white male with a score of 89, however, is not even eligible for consideration for promotion as long as there are persons on the promotional list with higher scores.

While most white male troopers would accept a form of affirmative action that would allow the Department of State Police to select a person on the basis of their minority status from a group of promotional candidates with *identical* scores, a far different reaction occurs when the minority individual is selected when he or she has a substantially lower promotional examination score. Not only is the minority individual with an inferior score stigmatized, but so are all other minority group members whose scores would have entitled them to promotions on their own merits, but who are assumed to have been promoted solely on the basis of their race, sex or national origin.

A white trooper with a 99 promotional score who is bypassed for promotion in favor of a black trooper with a score of 80 does not accept (or believe) the employer's explanation that the promotional exam is unreliable enough to warrant the conclusion that the two are *equally* qualified. Instead, the trooper perceives a blatant act of racial discrimination, and turns to the union for remedial action. The response of the union is often less satisfactory than the response of the employer: "Sure it is not fair, but it seems to be legal." It certainly makes no more sense to the affected trooper.

Public sector unions in Michigan are held to a higher standard of conduct than unions under the jurisdiction of the NLRB. The Michigan Supreme Court adopted the following standard in *Lowe v. Hotel and Restaurant Union Employees Union*, 389 Mich. 123, 145-147, 205 N.W.2d 167 (1973):

> A labor union has a duty fairly to represent its members.
>
> This duty arises from the nature of the relationship between the union and its members. The union and its members do not deal at arms length.

> The union speaks for the member. It makes a contract of employment on his behalf. The union offers its member solidarity with co-workers, expertise in negotiation, and faithful representation. In exchange, the member pays his union dues, and gives his support and loyalty to the union.
>
> In many ways, the relationship between a union and its member is a fiduciary one. Certainly, it is a relationship of fidelity, of faith, of trust, and of confidence.
>
> If the courts have stopped short of declaring the union and member relationship a fully fiduciary one, it is because the union, by its nature, has a divided loyalty.
>
> It must be faithful to each member, to be sure, but it must be faithful to all of the members at one and the same time.
>
> The union must be concerned for the common good of the entire membership. This is its first duty.
>
> That duty of concern for the good of the total membership may sometimes conflict with the needs, the desires, even the rights of an individual member.
>
> When the general good conflicts with the needs or desires of an individual member, the discretion of the union to choose the former is paramount.
>
> When the general good conflicts with the legal or civil rights of an individual member, the courts will recognize those rights and enforce them as against the will of the majority of the union membership.

The MSPTA has always undertaken its duty of fair representation conscientiously and vigorously. Now, however, it is confronted by competing demands: the demands of the majority (white males) to abolish race- and sex-determinative employment decisions and the demands of the minority (persons in underutilized categories) to the con-

trary. It faces anger and criticism, not to mention potential liability, no matter which way it turns. It is unfair to expect any public sector union, including the MSPTA, to predict how a court will view the legality of a public employer's affirmative action efforts, particularly when there has never been a finding of past discrimination on the part of the employer and affirmative action as practiced today far exceeds that which has ever been considered and approved by this Court in the past. Labor unions, who have been said to owe a higher standard of conduct to their members than do employers to their employees,[15] are entitled to know in advance: (1) when they *must* cooperate in affirmative action efforts of the employer; and (2) when they *may* oppose such efforts, through litigation or otherwise, because they constitute reverse discrimination.

CONCLUSION

If this Court concludes that race- and sex-determinative employment decisions by public employers, in the absence of identifiable victims of past discrimination, are violative of the Fourteenth Amendment, the concerns raised in this brief by amicus will be rendered moot. If, on the other hand, the Court approves of any form of governmental race or sex preferences without requiring identifiable victims of past discrimination, the Court is urged to speak decisively regarding the tolerable limits of such conduct.

The interpretations placed upon the past decisions of this court by the majority of federal circuit courts have seemed to approve virtually any form of affirmative action plan that seeks to achieve statistical parity between the employer's work force and the available labor pool. Yet a careful reading of this Court's past decisions on the subject reveals that each was decided on extremely narrow grounds. This case presents an opportunity for the Court to definitively settle one of the most controversial and divisive issues of our times. Affirmative action/reverse discrimination touches almost every American family in one way or another. In the past, the subject has been politicized. This Court is urged to take the politics out of this subject by clearly and unequivocally establishing the boundaries between legitimate affirmative action and illegal reverse discrimination.

[15] *N.A.A.C.P. v. Detroit Police Officers Assoc.*, 591 F. Supp. 1194, 1212 (E.D. Mich., 1984).

In so doing, the Court is urged to consider the implications of its ruling upon public sector labor unions, who have a duty to both majority and minority members within the union. The court can resolve the dilemma faced by unions, such as the MSPTA, by making it clear when a union is obligated to cooperate with affirmative action efforts by an employer and when it is free to oppose such efforts. The issues posed by amicus are not merely tangential to this case, but are inherently intertwined with those presented by Petitioners. Direct confrontation and resolution of these issues will reduce litigation in our overcrowded judicial system.

Respectfully Submitted,

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APPENDIX

APPENDIX 1

EXCERPT FROM ARTICLE 12 OF COLLECTIVE BARGAINING AGREEMENT (1984-1986) BETWEEN MICHIGAN DEPARTMENT OF STATE POLICE AND MSPTA.

b. *Layoff Implementation.*

(1) Notwithstanding other Sections of this Article pertaining to seniority in layoffs and recall, the employer may layoff, bump and recall out-of-line seniority to continue or initiate a Department of Civil Service-approved selective certification, or to administer an affirmative action program in accordance with Executive Order 1983-4, or its successor, and pursuant to Civil Service Commission approved guidelines and procedures.

(2) The affirmative action exception to seniority provided herein may only be exercised when employment in the bargaining unit is in a condition of underutilization or, by virtue of the seniority criterion, would be placed in a condition of underutilization of protected group members. Under no circumstances may the Department use the out-of-line seniority provision where the necessary result would be to increase the protected group's utilization rate in the bargaining unit above that in effect on the date of the layoff (or recall), except as the layoff, bumping, or recall of one protected group member may affect such ratios.

(3) The standard to be used in determining whether there is or would be underutilization of the protected group shall be the standard adopted pursuant to Executive Order 1983-4.

(4) The Employer shall give notice of its intent to use the affirmative action seniority exception to the Association and shall meet and discuss the impact of such determination pursuant to Part A above.

APPENDIX 2

EXCERPTS FROM DIRECTIVE FROM MICHIGAN LIEUTENANT GOVERNOR AND MEEBOC CHAIRPERSON MARTHA GRIFFITHS TO MICHIGAN DEPARTMENT AND AGENCY HEADS (MAY 21, 1984).

In response to the above and in accordance with the Guidelines adopted by MEEBOC on March 6, 1984, for the purpose of increasing protected group representation in underutilized classes, the following has been promulgated and are being issued as MEEBOC's Review and Approval Procedures to be followed during the early retirement period (June 2, 1984 to September 30, 1985).

1. All departments shall prepare and submit by June 10, 1984, to MEEBOC for approval, an Early Retirement Hiring and/or Replacement Plan which incorporates:

   a. A statement of the present status of affirmative action goals of the department.

   b. An indication of the existing under-utilization by payroll agency, by job category, by group and by class.

   c. A determination (calculation) of the percentage of goals which has not been met for the above indicated units.

   d. An indication of the impact of Early Retirement in terms of:

      (1) anticipated early retirements
      (2) anticipated hires and/or replacements
      (3) commitment to goals

   (Procedures for preparing the above indicated statement on present status of affirmative action goals in the department is included as Attachment No. 2).

2. Based on the established goals reflected in required Early Retirement Hiring and/or Replacement Plans,

departments will be expected to hire at a ratio of two (2) protected group persons for every one (1) non-protected group person hired or promoted until the goals reflected in the plan have been achieved, or a request to deviate from the ratio has been sought from MEEBOC and granted.

This required hiring ratio is predicated on a presumption of availability of protected group individuals which are certified for appointment consideration and the expectation that the hiring goal commitments set by the individual departments will be realistic. If a department needs to deviate from the 2 of 3 ratio, the department head must personally make the waiver request in writing to the Executive Director of MEEBOC which must then be reviewed and approved by MEEBOC before the appointment.

The above waiver provision is provided for purposes of addressing those instances where departments are unable to meet the hiring ratio requirement despite documented good faith efforts to do so.

3. Each department must file an Early Retirement Replacement Report Form with MEEBOC on the filling of all affected position vacancies which relate back to the MEEBOC approved Early Retirement Plan (See Attachment No. 3) for the form to be used.

   The MEEBOC Liaison Staff will monitor these hiring report forms for compliance with the 2 of 3 hiring/replacement commitment, until the goals of the departments are achieved.

   The 15 level equivalent and 12 level equivalent and above review process has been modified to accommodate the Early Retirement Program (See Attachment No. 4). These modifications will allow for reduced documentation and expedited processing where the 2 out of 3 hiring/replacement ratio is being met. Where the 2 out of 3 hiring/replacement ratio is

not being achieved, the revised review process must be followed.

It is well settled by the courts that affirmative use of race and gender conscious employment goals to alleviate the under-utilization of protected groups is not violative of federal or state law or of the Michigan or Federal Constitutions. The purpose and effect of the adopted procedures is to overcome the present consequences of past discrimination against women, minorities and handicappers as a group and to assure equal participation of women, minorities and handicappers in state government.

The United States Supreme Court has held that the use of affirmative action to overcome under-utilization of protected groups in the employer's workforce does not constitute discrimination within the meaning of Title VII of the Civil Rights Act of 1964.

The review and approval procedures under the Early and Out Retirement Program are specifically tailored and designed to remedy present consequences of past discrimination in employment against minorities, women and handicappers as a group and eliminating under-utilization. By working together we can achieve a racial and gender balance in the State of Michigan's Classified Civil Service workforce which roughly approximates but does not unreasonably exceed the balance that would have been achieved absent the past discrimination.

I look forward to your continued cooperation and I want to assure you that members of my staff will be avaiiable to provide assistance in every way possible in the achievement of this most important goal.

P

APPENDIX 3

ARTICLE XI, SECTION 5 OF THE MICHIGAN CONSTITUTION OF 1963.

State civil service; exemptions. The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

Civil service commission; members, terms. The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

State personnel director. The administration of the commissioner's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

Commission's duties as to classification, compensation, examinations, personnel transactions and conditions of employment. The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competi-

tive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

State police troopers and sergeants; collective bargaining; subjects covered. State Police Troopers and Sergeants shall, through their elected representative designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness; and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.

Certification of appointments or promotions; discrimination. No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases or decreases in compensation. Increases in rate of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice

and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-third vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

Creation or abolition of positions. The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency. Any employee considering himself aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures.

Compensation for unclassified service, recommendations. The civil service commisson shall recommend to the governor ar to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

Appropriations; return of unexpended moneys. To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all money unexpended for that fiscal year.

Reports and audits of expenditures. The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

Payments for personal service; judicial remedies. No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

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No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF LOCAL 36, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AND KEVIN MICHAEL BYRNE, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF LOCAL 36, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AND KEVIN MICHAEL BYRNE, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI

Local 36, International Association of Fire Fighters, AFL-CIO, is the exclusive representative, pursuant to D.C. Code §§ 1-618.10, 618.11, of all employees in the uniformed force of the District of Columbia Fire Depart-

ment ("DCFD") in the ranks of Firefighter through Captain. Kevin Michael Byrne, Curtis J. Callaway, Ronald J. Danner, James A. Funk, Thomas I. Herlihy, Joseph Worth Lane, Jr., Stuart J. Winokur, John E. Yocum and David F. Zollars are white members of the uniformed force of the DCFD who, together with Local 36, have brought suit on behalf of themselves and a class to challenge DCFD's adoption of racial preferences for the making of promotions. *Byrne, et al. v. Coleman, et al.*, D.D.C. No. 85-5626. *See Hammon v. Barry*, 37 BNA FEP Cases 1184 (1985). The principles by which this Court resolves the present case may affect the resolution of the *Byrne* suit as well as the contours of any "affirmative action" program that may ultimately eventuate in the DCFD. *Amici* therefore have a substantial interest in the principles governing the resolution of the instant case. This brief *amici curiae* is filed with the consent of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The school board and the teacher association in this case have agreed that layoffs of teachers shall be determined by a racial quota. This quota is not designed as a means to address racial discrimination in the hiring or laying-off of teachers. No finding has been made by any court or other governmental body that such discrimination even occurred—indeed, the school board has taken the position that there has been no such discrimination. Rather, the racial quota here is designed to serve an operational objective of the school board which is unrelated to the existence or non-existence of prior racial discrimination in filling teaching positions. That objective is to provide "role models" for minority students—an objective which the school board and the teacher association apparently believe can be better served by minority teachers than by non-minority teachers.

The lower courts fully understood that this operational objective was the predicate for the racial quota here. The district court stated as follows (Pet. App. 29a-30a):

> The requirement of some showing of previous underrepresentation of minorities must, of course, be adapted to the facts and circumstances of the particular case. . . .
>
> However, in the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models. See, *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732, 748 (W.D. Mich. 1980) ("faculty ought to begin to approximate the percentage of minority students in the district").
>
> Because of this one vitally important aspect of the teaching profession, the court holds that in applying the [*Detroit Police Officers' Association v.*] *Young* [608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981)] "substantial underrepresentation" standard, it may compare the percentage of minority faculty with the percentage of minorities in the student body, rather than with the percentage of minorities in the relevant labor pool.
>
> Applying this standard, it is clear that minority teachers were "substantially" and "chronically" underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan.

These passages were quoted and adopted by the court of appeals (Pet. App. 8a-9a, 10a).[1]

---

[1] References in opinions below to curing "underrepresentation" or "racial imbalance"—and occasional loose use of the term "discrimination"—must be understood in the context of the findings as

This Court has never before determined whether an employer—public or private—could justify a racial quota on the ground that the race of its employees is relevant to the employer's ability to perform its function. In this case, the Court is called upon to make that determination as a matter of constitutional law. But where, as here, the conduct in question may be proscribed by statute as well as by the Constitution, it is not the appropriate course for this Court to venture into constitutional adjudication without first determining the issue under applicable statutory law. Particularly at the formative stage of a body of decisional law, the proper course is to decide constitutional claims only after it is plain that threshold statutory claims are unsound. This Court has consistently refused "to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty." *Reserve Army v. Municipal Court*, 331 U.S. 549, 569 (1947). If the conduct at issue here violates a federal statute, there may never be need for the Court to resolve the constitutional question petitioners seek to raise. See *Cook v. Hudson*, 429 U.S. 165 (1976); *Rice v. Sioux City Cemetery*, 340 U.S. 70 (1955).

The applicable statute in this case is Title VII of the Civil Rights Act of 1964. In the district court, petitioners sought to challenge the racial quota at issue here under Title VII as well as under the Constitution, but that court, finding that "the plaintiffs have neither produced a notice of right-to-sue from the EEOC, nor otherwise alleged that the administrative prerequisites of Title VII have been fulfilled," dismissed "all Title VII claims . . .

---

to the nature and purpose of the layoff quota. The "underrepresentation" or "imbalance" referred to is simply the difference between the percentage of minority teachers and the percentage of minority students. And the existence of this difference is apparently all that is meant by use of the term "discrimination" in the opinions below.

for lack of jurisdiction" (Pet. App. 34a). Petitioners did not challenge that ruling in the court of appeals. Accordingly, their petition to this Court is based solely on their constitutional claims, and the Title VII claims are not before this Court.

As we show in part I, *infra*, Title VII prohibits racial preferences in employment that are predicated on the operational needs or objectives of the employer. In § 703(e)(1) of Title VII, Congress created a narrow exception to the Act's general prohibition against discrimination which permits employers to have preferences based on religion, sex, or national origin "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." Congress did not include preferences based on "race" or "color" in that exception. And the legislative history makes clear that that omission was intentional. In the words of the Act's floor manager in the House, "We did not include the word 'race' because we felt that race or color would not be a bona fide qualification, as would be 'national origin.' That was left out. It should be left out" (see *infra* at 8). Thus, Congress meant to leave no room for an employer to justify a racial preference on the ground that the operation of his business would be better served by filling a position with employees of one race rather than another.

If we correctly understand the meaning of the statute, there would have been no occasion for the Court to resolve the constitutional question in this case but for the failure of petitioners properly to assert the Title VII issue. That peculiar procedural posture is not a sound basis for constitutional adjudication of an issue of such a sensitive nature. *Cf. Rice v. Sioux City Cemetery, supra*; *Cook v. Hudson, supra*. At the least, even if there were doubt as to the correct interpretation of the statute,

there can be no doubt that the statutory question is a substantial one which the Court should decide before proceeding to determine the constitutional question. In these circumstances, we urge this Court to dismiss the writ of certiorari as improvidently granted.

In part II, *infra*, we address the constitutional issue in case the Court should decide to rule upon that issue. It is our submission that the racial quota in this case violates the Equal Protection Clause of the Fourteenth Amendment. The operational needs or objectives of a public employer cannot justify a racial quota. The operational needs rationale is not premised on a design to eliminate racial division. Rather, it assumes the existence of a significant degree of racial polarization in our society, and then permits government to cater to that polarization in order to achieve non-racial objectives. In so doing, it would accept, and to a degree perpetuate, the existence of such polarization.

Moreover, the operational needs justification is not self-limited, as are the other "affirmative action" rationales this Court has reviewed, to situations in which an advantage accrues only to some disadvantaged minority. To the contrary, pandering to the racial stereotypes of a *majority* constituency could arguably, in many instances, advance legitimate governmental objectives. The effectiveness of police officers, firefighters, teachers, social workers, psychologists, doctors, supervisors, prosecutors, judges and other governmental occupations may, in certain circumstances, depend upon the racial perceptions of the person or group being served. The logical reduction of the operational needs rationale is to divide government along racial lines, black public servants serving predominantly black communities, and whites serving whites. The Constitution does not permit governmental bodies to go down this road.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED: THE CONSTITUTIONAL ISSUE SHOULD NOT BE REACHED UNTIL THE STATUTORY ISSUE IS DECIDED.

If the contractual provision at issue here were properly challenged under Title VII, the provision would be found to violate the statute. Respondents have acted on the basis of race in determining which teachers to retain, because they believe it desirable for the operation of their enterprise that a certain proportion of the teaching positions be filled by blacks. See pp. 2-3 *supra*. But in enacting Title VII Congress made the considered judgment that employers should not be permitted to discriminate on that basis.

In § 703(a), Congress forbade discrimination on the basis of race, color, religion, sex, and national origin. In section 703(e)(1), Congress provided an exception to that prohibition:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of [employees'] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .

Section 703(e)(1) is the only provision of the Act that authorizes an employer to discriminate for the purpose of enhancing the "operation of [his] business." But the provision authorizes such discrimination only "on the basis of religion, sex, or national origin," not on the basis of race or color.

Congress' decision to exclude race and color from § 703(e)(1) was deliberate. It was protested by Rep.

Williams, who offered an amendment to add these classifications to § 703(e)(1) and explained:

> Mr. Chairman, why should there be discrimination against a Negro savings and loan association, with a provision that it would be compelled to hire white people whether it wished to or not? Why should there be discrimination against a Negro burial association, by telling it that it must hire white salesmen? Why should there be discrimination against a Negro insurance company, by telling it that it must hire white insurance salesmen, when they and all of us here know this would destroy the business completely because it would destroy its identity as a Negro business, the very quality responsible for its success? [2]

Rep. Celler, Chairman of the House Judiciary Committee, and floor manager of the Civil Rights Act, replied:

> We did not include the word "race" because we felt that race or color would not be a bona fide qualification, as would be "national origin." That was left out. It should be left out.[3]

See also the statement of Rep. Corman, in another context, that permitting black employers to hire only black salesmen because their customers are black would require permitting white employers to hire only white salesmen because their customers are white—a course that Congress should not take because it would perpetuate the very attitudes the bill was designed to erase. 110 Cong. Rec. at 2559; see also *id.* at 2563 (Rep. Roosevelt).

Rep. Williams' amendment was defeated in the House by a voice vote. 1964 Leg. Hist. at 3191. The Senate accepted § 703(e) as written by the House. The Clark-Case materials which explain the views of the Act's sponsors state (*id.* at 3014):

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[2] United States Equal Employment Opportunity Commission, Legislative History of Titles VII and IX of the Civil Rights Act of 1964 (hereinafter "1964 Leg. Hist."), at 3191.

[3] *Ibid.*

> [T]here is no exemption in title VII for occupations in which race might be deemed a bona fide job qualification, . . .

It is thus apparent that in 1964 the sponsors of Title VII rejected the notion that an employer should be permitted to make race-based employment decisions for the purpose of serving the "operation of [his] business." When the Act was extended to public employers in 1972, no change was made in § 703(e)(1); and nothing in the statute grants to public employers any more license to make race-based employment decisions than is granted to private employers.[4] Consequently, the layoff policy at issue here could not survive scrutiny under Title VII.

While the discussion to this point should be dispositive of the Title VII issue, we feel compelled to add that nothing in *Steelworkers v. Weber*, 443 U.S. 193 (1979), implies that Congress in enacting Title VII meant to permit employers to use racial preferences on the ground

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[4] As the Court stated in *Dothard v. Rawlinson*, 433 U.S. 321, 331-332, n.14 (1977), "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." To the extent that Congress desired a different regime in the public and private sectors, this was accomplished in § 701(f) by excluding the following public employees from coverage:

> [A]ny person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the proceeding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

Section 701(f) embodies Congress' judgment of the precise extent to which the inherent functional differences between the public and private sectors should be given weight in developing a comprehensive statutory law of equal employment opportunity. That provision aside, Congress intended that on questions of coverage and legal obligation, private and public employers are to be regarded as a single class.

that there is an operational justification for doing so. In *Weber*, this Court noted that the racial quota there at issue was intended "to accomplish the goal that Congress designed Title VII to achieve." *Id.* at 204. Both the quota in *Weber* and Title VII itself "were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'" *Id.* at 208. Nothing in *Weber* suggests that there is any room under Title VII for use of racial preferences for the entirely different purpose of serving an employer's operational needs; and, as we have shown, Congress precluded such preferences by declining to include race and color in § 703(e)(1). *Weber* therefore has no application to this case.[5]

For the foregoing reasons, the racial quota here would violate Title VII. At the least, there is a substantial issue

[5] Even if the purpose of the quota here were the same as the purpose of the quota in *Weber*, it is far from clear that the quota plan here would meet the other requirements of *Weber*. The *Weber* Court did not "define in detail the line of demarcation between permissible and impermissible" racial preferences. 443 U.S. at 208. But the Court did point to two factors that distinguish *Weber* from the instant case. First, the plan in *Weber* did "not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers. . . ." *Id.* at 208. Indeed, the quota plan in *Weber* created new opportunities—a new in-plant craft training program—for white as well as black employees. The quota plan here, on the other hand, requires that white employees lose jobs which their seniority would entitle them to maintain. Cf. *Hammon v. Barry*, 37 BNA FEP Cases 609, 622 (D.D.C. 1985). Second, the *Weber* Court emphasized that the racial quota there would end as soon as the percentage of black craftworkers at the plant approximated the percentage of blacks in the local labor force. 443 U.S. at 208-209. Thus "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.* at 208. This was essential to the Court's approval of the plan, because, as the Court observed, the legislative history indicates that Title VII "would not allow establishment of systems 'to *maintain* racial balance in employment.'" *Id.* at 207, n.7 (emphasis by the Court). But that is precisely what the plan here at issue seeks to do.

as to the quota's legality under Title VII. The statutory question should be resolved before this Court ventures to determine whether the Constitution permits a public employer to discriminate on the basis of race in order to further the employer's operational needs. The instant case does not, because of its peculiar procedural history, raise the statutory issue. The writ of *certiorari* should therefore be dismissed as improvidently granted. *Reserve Army v. Municipal Court, supra*; *Cook v. Hudson, supra*; *Rice v. Sioux City Cemetery, supra.*

II. THE RACIAL QUOTA IN THIS CASE IS UNCONSTITUTIONAL.

A. The constitutional issue raised here is different in nature from any the Court has decided before. The so-called "affirmative action" programs this Court has previously measured against the Constitution all were meant in one way or another to end racial divisions that exist in our society. See *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *University of California Regents v. Bakke*, 438 U.S. 265 (1978);[6] *Fullilove v.*

[6] Mr. Justice Powell, writing separately, discussed a purpose of the quota program in *Bakke* that is akin to the operational needs rationale: "improving the delivery of health care services to communities underserved" (438 U.S. at 310). Justice Powell stated (*ibid.*):

> It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.

Justice Powell went on to quote a passage from the lower court's opinion in that case which included the following (*id.* at 311):

> [T]here are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in

Klutznick, 448 U.S. 448 (1980). Never before has this Court been called upon to approve a racial quota adopted for operational needs.[7]

The operational needs justification is not premised upon a design to eliminate racial division. Rather, it assumes the existence of a significant degree of racial polarization in our society, and then permits government to cater to that polarization in order to achieve nonracial objectives. In so doing, it would accept, and to a degree perpetuate, the existence of such polarization.

Thus, in the instant case, the notion that minority teachers would better serve as role models for minority students is based upon the assumption that in the present state of affairs many students perceive their teachers

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the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive.

Subsequently, in a concurring opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980), Justice Powell referred to that discussion in *Bakke* in the following statement:

> Nor has Congress sought to employ a racially conscious means to further a nonracial goal. In such instances, a nonracial means should be available to further the legitimate governmental purpose. See *Bakke*, 438 U.S. at 310-311.

[7] Both courts below made liberal reference to the *Weber* decision. As discussed, *supra* at 9-10, *Weber* did not involve the operational needs rationale, and in any event *Weber* was based solely on Title VII. The courts below apparently assumed that Title VII and the Constitution set identical standards in this area. There is no basis for that assumption: Title VII, especially the part construed in *Weber*, is the product of a particular set of legislative objectives as manifested in the language and history of the statute (*Weber*, 443 U.S. at 202-208); Title VII was not meant to and does not replicate constitutional standards. *Washington v. Davis*, 426 U.S. 229, 238-239 (1976).

through the prism of racial stereotypes, and that, as a result, the race of teachers affects the way in which students respond to teachers. Similarly, it has been argued that the effectiveness of police officers and firefighters is a function of the degree to which they are trusted by the community being served, which in turn, the argument goes, in the present state of our society may be a function of the race of the officers or firefighters. The question posed here is whether a governmental determination to accommodate such racial divisions in order to seek to serve a nonracial objective may validate under the Constitution preferential treatment of one race over another. It is our submission that, however well meaning such objectives may seem, racial preferences of this kind are at the core of what the constitutional proscription of race discrimination is meant to address.

Arguably there may be instances where the present state of racial division in this country poses a significant obstacle to the achievement of important governmental objectives.[8] Perhaps the best articulation of that concern

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[8] There is reason to doubt that the "need" to employ a particular percentage of minority teachers as role models could fit into this category. Teachers have continuing interaction with students over the course of many months. There is little reason to presume that only black teachers can effectively teach or serve as role models for black students. If a school district's goal is to demonstrate to black students that race need not be an impediment to their aspirations, it is far from apparent that such a message cannot be conveyed by white teachers who are dedicated to that goal. History and common experience are surely not devoid of instances in which a white person, whether in public or private life, has served as a role model for a black person, and has contributed to the latter's sense of self-esteem and opportunity. Cf. *Bakke*, 438 U.S. at 311 (Opinion of Powell, J., quoting the lower court opinion in *Bakke*) (" 'there are more precise and reliable ways to identify applicants who are genuinely interested in the . . . problems of minorities than by race' "). In any event, whatever benefit might be thought to accrue from having a particular percentage of black role models may be outweighed by the other lesson that would be taught: that discrimination on the basis of race is not only accepted in our society but sanctioned by the government.

has been in the context of attempts to provide effective law enforcement in certain racially-tense communities. The Sixth Circuit's decision in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir.), *cert. denied*, 452 U.S. 938 (1981), which was heavily relied upon in the opinions below in the instant case, directly confronted this problem and put the argument for a racially-based hiring program in the following way:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

But to accept that racially-based "perceptions" of one group or another may determine public policy is in part to validate those perceptions. The use of racial stereotypes as a premise for governmental action perpetuates those stereotypes and puts further off the day when racial polarization is not a pervasive factor in our society.

It is important to recognize in this connection that the operational needs justification, based as it is on "public perceptions," is not self-limited, as are the other "affirmative action" rationales this Court has reviewed, to situations where an advantage accrues only to some disadvantaged minority. To the contrary, pandering to the racial stereotypes of a *majority* constituency could arguably, in many instances, advance an important governmental objective. The argument made in the *Detroit Police Officers'* case could as easily be made in many white communities to justify the preferential hiring of white police officers.

It is important as well to recognize that the operational needs justification has potential application to virtually

every facet of governmental activity. The effectiveness of police officers, firefighters, teachers, social workers, psychologists, doctors, supervisors, prosecutors, judges, and other governmental employees may, in certain circumstances, depend upon the racial perceptions of the person or group being served.

The logical reduction of the operational needs rationale is to divide government along racial lines, black public servants serving predominantly black communities, and whites serving whites. At stake is the constitutional principle of nondiscrimination by government and the opportunity for a future society free of racial division. Even assuming the arguable factual predicates of the operational needs rationale, that stake is too high to trade off for the short-term ability of government most effectively to meet today's exigencies.[9]

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[9] Where a school district has engaged in *de jure* segregation, this Court has held that the district is permitted—indeed required—to take race-conscious steps to desegregate the faculty as well as the student body, "as part of the process of dismantling a dual system." *Milliken v. Bradley*, 433 U.S. 267, 282-283 (1977). See also *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969). The justification for such race-conscious action, however, is not the perceived operational needs of the school district, but the constitutional obligation of a district which has engaged in *de jure* segregation "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979), quoting *Green v. County School Board*, 391 U.S. 430, 437-438 (1968). "[The] [r]acial classifications [sustained in the desegregation cases] thus were designed as remedies for the violation of constitutional entitlement. Moreover, the scope of the remedies was not permitted to exceed the extent of the violations." *Bakke*, 438 U.S. at 301 (Opinion of Powell, J.). In short, nothing in the school desegregation decisions sanctions the use of racial classifications for any purpose other than dismantling a *de jure* segregated school system. The layoff policy at issue here—which forecloses the affected white teachers from being employed at all, rather than merely determining whether they will be assigned to one school or another—gains no support from those decisions. See *id.* at 300, n.39, 305.

Even as to policies that deal solely with student or faculty *assignments*, as distinguished from hiring or layoff practices, the Court

B. We do not mean to suggest that had the racial quota here been based upon some other ground it would pass constitutional muster. To the contrary, we believe this quota would be constitutionally infirm whatever its purported justification.

The layoff quota here is designed to preserve whatever progress the school system has made toward the ultimate goal of "hav[ing] at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools" (Pet. App. 1a). As such, whatever the motivation underlying the quota, it is designed to achieve a certain racial balance. Establishment of racial balance, in and of itself, is *not* a permissible governmental objective. *Bakke*, 438 U.S. at 307 (opinion of Powell, J.); *Fullilove*, 448 U.S. at 529 (dissenting opinion of Stewart, J.).

Nor could the quota be justified as a means to redress prior or current discrimination in the hiring or laying-off of teachers. In the first place, no court or agency has found, and the record in this case does not show, that such discrimination has occurred or is occurring—indeed, the school board has taken the position that there has been no such discrimination (Pet. App. 40a). See *Bakke*,

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has disapproved desegregation remedies that would mandate the maintenance of a particular racial balance. See *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434-436 (1976); *Swann v. Board of Education*, 402 U.S. 1, 24-25 (1971). In so doing, the Court has reasoned that although students have a constitutional right not to be subjected to a dual school system, they have no right to a "particular degree of racial balance or mixing." *Swann, supra*, 402 U.S. at 24; *Spangler, supra*, 427 U.S. at 434.

Finally, we note that the Court has not determined whether any form of racial classification—even as pertains solely to assignments of students or teachers—is permissible in the absence of a finding of *de jure* segregation; that question "raises constitutional difficulties" that have not been resolved by the Court. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 492 n.6 (Powell, J., dissenting). See also *id.* at 472 n.15 (Opinion of the Court).

438 U.S. at 307-308 (Opinion of Powell, J.). Moreover, even if the school board had discriminated on the basis of race in hiring or laying-off teachers, the layoff quota here is in no respect "tailored" to redress such discrimination.[10] The black teachers who would benefit by the quota have, by definition, been hired by the school board —certainly nothing in the record indicates they were victims of hiring discrimination. A racial preference benefiting them does nothing to redress the loss of any individuals who were, *arguendo*, victims of hiring discrimination. Such a preference would serve only to affect the number or proportion of black teachers—the racial balance—not to make any victim whole. There is thus no congruence between the layoff quota and any prior hiring discrimination.[11]

Although the Court has not yet settled on the precise parameters of the "tailoring" requirement, the Court

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[10] As Justice Powell put it in his opinion in *Bakke*, the government's reliance on race must be "precisely tailored" to serve the articulated governmental interest. 438 U.S. at 305. That is to say, a racial classification must be applied only insofar as is "necessary . . . to the accomplishment" of the government's purpose (*id.* at 305), and must be tailored so as to "work the least harm possible to other innocent persons . . . ." (*id.* at 308). *See also Fullilove*, 448 U.S. at 480 (opinion of Burger, C. J., joined by White and Powell, JJ.) (even where Congress acts pursuant to its authority to enforce the Fourteenth Amendment, any use of "racial or ethnic criteria" must be "narrowly tailored to the achievement of [a proper] objective"); *id.* at 486-487 (same); *id.* at 490 (same); *id.* at 551-552 (Stevens, J., dissenting). See also *id.* at 519 (opinion of Marshall, J., concurring in the judgment, joined by Brennan, J, and Blackmun, J.) ("racial classifications designed to further remedial purposes" must, to be sustained, be "substantially related to achievement of [important governmental] objectives").

[11] Nor could the layoff quota be justified as necessary to avoid discrimination in the layoff process itself. If there were no racial quota, layoffs would be governed by strict application of seniority (Pet. App. 1a). Accordingly, there is no basis for any claim that the quota serves to benefit those who would otherwise be victims of racial discrimination in layoffs.

seems unanimous that at least some degree of congruence between the racial preference and prior discrimination must be established for a racial preference to be upheld on this basis. See *Bakke*, 438 U.S. at 299, 305, 307-310 (Opinion of Powell, J.); *id.* at 377 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.) (emphasizing that the program at issue "does not simply equate minority status with disadvantage. Rather, [the program] considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination"); *id.* at 378 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("[I]t is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief *where the probability of victimization is great*") (emphasis added); *Fullilove*, 448 U.S. at 471 (Opinion of Burger, C.J., joined by White and Powell, JJ.) (emphasizing that the program was tailored to apply to "only such minority individuals as are considered to be economically or racially disadvantaged"); *id.* at 511-516 (Powell, J., concurring); *id.* at 540-541 (Stevens, J., dissenting). Under any formulation, the absence of any nexus between the racial preference and prior discrimination would require invalidation of the preference. That is the situation here.

An assertion of "prior discrimination" is not a license to permit racial preferences in any form as long as they benefit individuals who are members of the victimized race. Unless a racial preference is designed to benefit victims of the discrimination being addressed, it is simply a means to benefit one person who has not been victimized at the expense of another person who has committed no wrong, solely on the basis of race. Such a result has all the elements of the race discrimination that is at the core of what the Fourteenth Amendment prohibits.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be dismissed as improvidently granted. If the writ is not dismissed, the judgment of the Sixth Circuit should be reversed and the case remanded with instructions to enter judgment for petitioners.

Respectfully submitted,

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No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan and RICHARD SURBROOK, President and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITIONERS

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QUESTION ADDRESSED

Is it constitutionally permissible for a public school board to use a teacher layoff plan containing racial and ethnic classifications where:

a. the objective of the plan is to preserve the "minority balance" of teachers as part of an effort to achieve "at least the same percentage of minority representation on each individual staff as is represented by the student population";

b. the result of the plan is that teachers who are not "Black, American Indian, Oriental or of Spanish descendancy" are deprived of employment while the employment of less senior teachers, who are "minority group personnel," is preserved;

c. the plan is not a remedy for unconstitutional segregation or unlawful employment discrimination as no court, legislative body, administrative agency or school board has found either to exist; and

d. the foundation of the plan—that there is a "vitally important" educational need of minority students for race-alike role models in a representative proportion—is not a "finding" of the school board but is an assumption, originating in the decisions below, which is unsupported by the record, legal precedent, professional literature or empirical research?

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITIONERS

CONSENT OF THE PARTIES

Petitioners and Respondents consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Founded in 1916, the American Federation of Teachers, AFL-CIO ("AFT") is a labor organization representing more than half a million members in over 2,000 local affiliates. AFT's membership includes more than 450,000 elementary and secondary school teachers, college and university professors and others employed in public and private education. AFT teachers are of both sexes, all races and many ethnic groups. As bargaining representatives for public school teachers and staff, AFT local affiliates regularly negotiate and administer collective bargaining agreements with public school systems.

As a trade union of educators, AFT actively supports school and faculty and staff desegregation and affirmative action programs. AFT's historical commitment to the principle of equal educational opportunity has served as a philosophical foundation for both its collective bargaining and legislative activity. Beyond education, AFT has been at the forefront in the struggle to eliminate segregation and discrimination in housing, employment and public and private institutions.

Throughout its history, AFT has fought to improve the quality of education and the welfare of teachers, seeking to preclude employer use of invidious and subjective methods of distributing employment benefits. AFT seeks fairness of treatment through the application of objective, racially-neutral criteria. Assuring teachers freedom from race-based employment decisions is essential to their ability to be effective educators.

AFT is committed to full integration of our public school systems and our society. AFT does not believe this commitment is served by public employer decisions about teacher employment made on the basis of race and ethnic

background. Nor does AFT believe that public school students or teachers are entitled to a proportionally representative faculty, determined by race and ethnicity. These concepts are contrary to basic constitutional principles. All persons are entitled to be free from state classifications based on race, religion, gender or national origin.

These principles are the basis for AFT's argument for reversal of the decision below.

STATEMENT OF THE CASE

In its 1972 collective bargaining agreement with the Jackson Education Association ("Association"), the representative of Jackson public school teachers, Respondent Jackson Board of Education ("Jackson" or "Board") established a teacher layoff plan which contained racial and ethnic classifications. The agreement reads, in pertinent part:

> ARTICLE VII.D.1. The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff is as represented by the student population of the Jackson Public Schools.
>
> ARTICLE VII.D.2. In order that this goal be expeditiously met, it is agreed that, for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies. The Board will annually review each individual staff to ensure proper minority representation.

* * * *

> ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.

This layoff plan is contained in all later agreements between the Board and the Association, including the agreement currently in effect.

In the 1981-1982 school year, Petitioners—eight Jackson teachers—were laid off while less senior teachers were retained. Petitioners were laid off pursuant to Article XII.B.1. of the agreement. Petitioners were laid off while less senior teachers were retained because Petitioners are not "minority group personnel" as defined in Article VII.D.1. of the agreement; they are not "Black, American Indian, Oriental or of Spanish descendancy."

Petitioners sued Respondents, complaining, *inter alia*, that a layoff plan containing racial and ethnic classifications, established and implemented by a public school board, violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The District Court rejected Petitioners' claim, upholding the layoff plan as being a reasonable device to remedy "underrepresentation of minority teachers" as measured by the difference between the percentages of minority faculty and minority students. *Wygant v. Jackson Board of Education*, 546 F. Supp. 1195, 1201 (E.D. Mich. 1982). The District Court approved the plan as

serving a "vitally important aspect of the teaching profession": a need for race-alike role models in a proportionally representative number. *Id.* The Sixth Circuit Court of Appeals affirmed. *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984).

ARGUMENT

I.

Jackson's layoff plan chooses who will teach and who will not on the basis of race and ethnicity.

Jackson's plan gives preference to "minority group personnel"—to teachers who are "Black, American Indian, Oriental or of Spanish descendancy." Its objective is to preserve "minority balance."

Jackson's plan is not a remedy for unlawful employment discrimination affecting Jackson teachers or teacher applicants. No court, no legislative body, no administrative agency—and no Jackson school board—has found that Jackson engaged in unlawful employment discrimination.

Jackson's plan is not a remedy for unconstitutional segregation. No Jackson school board found that unconstitutional segregation exists. No court has found any constitutional violation in the Jackson school system.

Rather, the layoff plan is a voluntary effort to preserve "minority balance" as part of Jackson's broader objective: "to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools." Article VII.D.1. Jackson's plan pursues this objective at the expense of innocent teachers, teachers who lose their jobs because they are not "minority group personnel." *Id.*

The decisions below find a "faculty racial imbalance," largely on the basis of a single statistic: In 1971, the

year before the plan was first established, there was a difference between the percentage of Jackson's minority teachers (between 8.3 and 8.8 percent) and the percentage of Jackson's minority students (15.9 percent). 746 F.2d at 1156; 546 F. Supp. at 1197.[1] This difference, the decisions below conclude, is significant because:

> [T]eaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models.

746 F.2d at 1156; 546 F. Supp. at 1201. As there was a difference between the percentages of minority teachers and minority students, because "societal discrimination has often deprived minority children of other role models," because race-alike role models are a "vitally important aspect of the teaching profession," the decisions below hold that a public employer may use racial and ethnic classifications in employment decisions.

II.

We address the Court as *amicus curiae* to state our conviction that the foundation of the decisions below—that a need for proportionally representative race-alike role models is "one vitally important aspect of the teaching profession"—is without basis. It is unsupported in the record before this Court. It is unsupported by legal precedent, professional literature or empirical research.

The record contains nothing to justify, or even define, the race-alike role model concept. There is no evidence of the educational impact of race-alike role models or that the presence of race-alike role models in some minimum number is a "vitally important aspect of the teaching profession."

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[1] This brief uses the term "minority" as defined by Jackson, to include faculty, staff, and students who are "Black, American Indian, Oriental or of Spanish descendancy." Article VII.D.1.

Significantly, there is nothing in the record to show that the Jackson school board has ever even considered the race-alike role model concept. Jackson adopted a policy of "actively seeking minority group personnel" to achieve "at least the same percentage of minority racial representation on each individual staff as is represented by the student population" because it recognized the "desirability of multi-ethnic representation on the teaching faculty." Article VII.D.1. Recognition of the desirability of multi-ethnic representation on the teaching faculty—which, we agree, is of benefit to students of all races and ethnicity—is a far cry from the pronouncement that the need of minority students for race-alike role models in a representative proportion is such a "vitally important aspect of the teaching profession" that it warrants the termination of the employment of others on the basis of race. This "vitally important aspect" idea originated with the District Court and was endorsed by the Court of Appeals; it never was a "finding" of the Jackson school board. The race-alike role model concept is indulged by the decisions below without support in the record.

Nor is there persuasive judicial authority to support the decisions. We are aware of a number of decisions that have considered the race-alike role model concept. In seven, all school desegregation cases, parties argued that the segregation of minority faculty in predominantly minority schools is justified to provide race-alike role models for minority students.[3] Six of these decisions

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[3] *See, Diaz v. San Jose Unified School District*, 705 F.2d 1129 (9th Cir. 1983) and *Diaz v. San Jose Unified School District*, 518 F. Supp. 622 (N.D. Cal. 1981), *aff'd.*, 705 F.2d 1129, *rev'd.*, 733 F.2d 660 (9th Cir. 1984); *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980) and *Reed v. Rhodes*, 455 F. Supp. 546 (N.D. Ohio 1978); *Arthur v. Nyquist*, 415 F. Supp. 904 (W.D. N.Y. 1976), *modified*, 573 F.2d 134, *cert. denied sub nom. Manch v. Arthur*, 439 U.S. 860 (1978); *U.S. v. School District of Omaha*, 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

reject this argument.[4] Two specifically observe that the logical extension of the race-alike role model concept is segregation.[5] The seventh found no evidence justifying race-based faculty assignments to provide race-alike role models.[6]

We are aware of only two decisions which justify race-based teacher layoff procedures on the need of minority students for some minimum proportion of race-alike role models. Both are in school desegregation cases in which the layoff procedures were efforts to remedy constitutional violations found to exist by courts. *Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732, 747-748 (W.D. Mich. 1980), *vacated*, 706 F.2d 757 (6th Cir. 1983); *Morgan v. O'Bryant*, 671 F.2d 23, 27 (1st Cir.),

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[4] *Diaz*, 518 F. Supp. at 640; *Reed*, 607 F.2d at 725; *Reed*, 455 F. Supp. at 566; *Arthur*, 415 F. Supp. at 945-946; *Omaha*, 521 F.2d at 538, n. 14; *Kerrigan*, 509 F.2d at 596.

[5] *Omaha*, 521 F.2d at 539, n. 14; *Arthur*, 415 F. Supp. at 945-946. In *Arthur*, the school board justified its race-based faculty assignments on the basis of a "sound educational rationale": "the need of black students for role models and because the black teachers and administrators have greater understanding of the black community." 415 F. Supp. at 945-946. The court observed that this rationale "if carried to its logical conclusion, supports the complete separation of races in public schools". *Id.* at 946.

[6] *Diaz*, 705 F.2d at 1132-1133. We are aware of two decisions in addition to those discussed in the text. *See Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), holding that race-based teacher assignments are permissible as part of a school desegregation remedy, which notes the desirability of race-alike role models in passing, and *Evans v. Buchanan*, 582 F.2d 750, 773 (3d Cir. 1978), *cert. denied*, 446 U.S. 923, *reh'g denied*, 447 U.S. 916 (1980), which acknowledges, but does not rely upon, the testimony of educators that the presence of race-alike role models would smooth the transition for both black and white students moved from one school to another during the initial desegregation of a school system.

cert. denied sub nom. Boston Association of School Administrators and Supervisors v. Morgan, 459 U.S. 827, *cert. denied sub nom. Local 66, Boston Teachers Union v. Boston School Committee*, 459 U.S. 881, *reh'g. denied*, 459 U.S. 1059 (1982), *reh'g. denied*, —— U.S. ——, 77 L.Ed.2d 1401 (1983). *Morgan v. O'Bryant*, like the decisions below, cites the District Court decision in *Oliver* as its sole authority for the race-alike role model concept. 671 F.2d at 27.[7] The District Court's decision in *Oliver*, the "leading" race-alike role model case, was vacated by the Sixth Circuit Court of Appeals.

The District Court's decision in *Oliver* is the only decision of which we are aware that relies on record evidence for its view that race-alike role models must be present in some minimum proportion. That evidence, the testimony of Dr. Robert Green, is summarized by the District Court, 498 F. Supp. at 748:

> As a general rule, Dr. Green stated that a school district's faculty ought to begin to approximate the percentage of minority students in the district; however, other factors must be considered, so the critical mass is not always equal to student ratios. In Kalamazoo, he said he would trust the [School] District's judgment in setting 20% as the critical mass.

The Sixth Circuit Court of Appeals reversed the District Court's approval of a race-based layoff procedure, holding that the 20% "critical mass"—endorsed by Dr. Green and based on the school district's minority student population—was arbitrary. *Oliver*, 706 F.2d at 762-763. The court held that students are not entitled to race-alike

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[7] A different decision in the same school desegregation case rejected the race-alike role model concept as a justification for the assignment of minority teachers to predominantly minority schools. *See, Morgan v. Kerrigan*, 509 F.2d 580, 596 (1st Cir. 1974), approving the lower court's finding that there is "no systematic inquiry or empirical data to support" a "need of black children for black adult role models[.]"

role models in some minimum proportion; rather "all that the students are entitled to is the 'sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices.'" *Id.*

Despite judicial consideration of the race-alike role model concept in school desegregation cases over the last ten years, there is no persuasive support for the proposition that race-alike role models must be present in a representative proportion to cure some role model deprivation suffered by minority students. And we are aware of no persuasive support for this proposition in professional literature or empirical research.[8] The assumptions of the decisions below—that race-alike role models are "vitally important" and that they are effective in producing salutary ends only when present in some minimum number—are articles of faith, supported only by intuition.

III.

We do not minimize the utility of the role model concept as we understand it. There is no doubt that "teaching is more than just a job." Directly and indirectly, by instruction and by example, teachers influence and motivate students. Teachers impart values as well as knowledge. In this sense, "teachers are role models for their students."[9]

[8] *See* Clague, "Voluntary Affirmative Action Plans In Public Education: Matching Faculty Race to Student Race—Anticipating a Supreme Court Decision", unpublished paper presented at the annual meeting of the American Educational Research Association, Chicago, Illinois on April 2, 1985, to be published in revised form under the same title in 14 *Journal of Law and Education* No. 3 (July, 1985). Professor Clague observes: "Systematic study, based on a role model theory, of the relationship between minority students' objectively measureable success and the race of teachers with whom they have contact, does not appear to exist." at 45. *See also Morgan v. Kerrigan*, 509 F.2d 580, 596 (1st Cir. 1974) (there is "no systematic inquiry or empirical data" to support the race-alike role model concept.)

We recognize that we as teachers have great responsibility. Accordingly, we should be highly competent, knowledgeable, skilled in communication, unbiased, honest, diligent and committed to our students and profession. We should possess these and many other positive characteristics and values. Acknowledging this does not permit the conclusion that we must be, or even should be, by some representative proportion, "Black, American Indian, Oriental, or of Spanish descendancy" or white; or male or female; Christian, Jewish, or Muslim; of Polish or Italian or German or Irish descendancy; or tall, short, fat, or thin.

We, like Jackson, believe that it is educationally desirable for all students to be exposed to multi-racial and multi-ethnic role models. This is consistent with our pursuit of an integrated society. We believe that diversity among teaching faculty is culturally enriching and will foster tolerance and understanding. But there is no evidence that diversity or race-alike role models are more important—or even as important—than other factors.[10] Assuming the desirability of race-alike role models, there is no basis for concluding they must be present in some

[9] This is consistent with our experience as teachers and "commonsense" judgment. *See, Ambach v. Norwick*, 441 U.S. 68, 79 n. 9 (1979).

[10] We believe, to paraphrase Justice Marshall, that it is better to have an excellent teacher role model of another race than a poor teacher role model of one's own race. *Ambach v. Norwick*, 441 U.S. 68, 87 (1979) (Marshall dissenting). Further, we believe that the effectiveness of a teacher is affected by a myriad of factors, including those personal characteristics listed above and others, such as student-teacher ratios, quality of textual and teaching materials, preparation time, staff and administrative support, physical facilities, parental support, etc. We know of no support for isolating race as the single controlling factor.

proportionally representative number.[11] There is no support for the idea that race-alike role models are such a

[11] We point out that the record below establishes the substantial presence of minority faculty and staff in Jackson's schools as well as Jackson's success in recruiting minority faculty and staff.

The decisions below note that in 1953 (before *Brown v. Board of Education*, 347 U.S. 483 (1954)), there were no black teachers in Jackson schools. In 1961, 1.8 percent of Jackson's teachers were black. In 1968-1969, black teachers constituted 3.9 percent of the faculty. In 1970-1971 minority faculty was 5.5 percent. In 1971-1972 minority faculty was between 8.3 and 8.8 percent. 746 F.2d at 1156; 546 F. Supp. at 1201.

What the decisions below do not note, but the record discloses, is that by 1981-1982—the year Petitioners lost their jobs—minority teachers were 13.5 percent of the faculty. Sixth Circuit Joint Appendix ("SCJA") at 15. In that same school year, the percentage of minority administrators was 19.6, the percentage of minority faculty in coaching positions was 18.3 and the percentage of minority teacher aides was 30.1. SCJA at 7, 13 and 14. In 1982-1983, the latest statistics contained in the record, the minority percentages were: teachers—13.9; administrators—24.4; coaches—29.3; teacher aides—29.6. SCJA at 7, 13-15.

The percentages of Jackson's minority faculty and staff can be viewed in the context of the relevant labor market, the measure used to determine "conspicuous racial imbalance in traditionally segregated job categories". *Steelworkers v. Weber*, 443 U.S. 193, 209 (1979). *See Hazelwood School District v. U.S.*, 433 U.S. 299 (1977).

In *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732, 745 (W.D. Mich. 1980), *vacated*, 706 F.2d 757 (6th Cir. 1983), the court-ordered study of the Kalamazoo, Michigan school district—located approximately 60 miles from Jackson—reported these indicators of the relevant labor market for the 1977-1978 school year: percentage of black applicants—11.7; percentage of education degree conferred on blacks in Michigan colleges and universities in 1975-1976—10; percentage of black population in Michigan—9.7; and percentage of black population in United States—11. In Jackson in 1977-1978, the minority faculty and staff percentages were: teachers—10.9; administrators—20.4; teacher aides—18.7. SCJA 13-15. These figures show there were race-alike role models for minority students in Jackson and they were present in numbers near or exceeding what might be expected from relevant labor market indicators.

"vitally important aspect of the teaching profession" that the fact that they are not present in a proportionally representative number warrants the termination of other teachers on the basis of race or ethnicity.

Jackson's layoff plan cannot be justified merely because it is well-intentioned or because it pursues desirable educational and societal objectives or because it is contained in collective bargaining agreements.[12] The layoff plan is unjustified because its premise—that race-alike teacher role models in representative proportion are "vitally important"—is unjustified and, we believe, unjustifiable.

The race-alike role model concept as employed in the decisions below is an insidious proposition. Carried to its end, it would justify the resegregation of American public schools, where students may be properly taught only by teachers of their own race. Or gender. Or religion. Or ethnic group.

Endorsed by public schools and courts, the race-alike role model concept communicates to students, teachers and the public that it is legitimate to make decisions about individuals based on race and ethnicity. This, of course, is contrary to basic constitutional principles.

[12] Collective bargaining between employers and democratically selected trade unions is a fundamental value of free societies. But a public employer's use of race and ethnic classifications to make employment decisions is neither insulated from judicial scrutiny nor constitutionally justified because it is included in collective bargaining agreements. The constitutional propriety of a public employer's racial classifications cannot depend on employee approval. If such approval validated a public employer's use of racial classifications, many American school districts would remain segregated. Nor can an individual teacher's right to be free from employer decisions based on race be waived by fellow employees. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.")

And it reenforces the very evil we are committed to eliminating.

Also, by its nature, the race-alike role model concept requires the perpetual use of racial classifications: to ensure race-alike role models in the proportion of minority students, the faculty will have to be adjusted annually by race. A permanent racial classification is not remedial. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436 (1976).

School children need teachers who are skilled, knowledgeable, and sensitive, teachers who are able to practice their profession in a fair work environment where they enjoy the minimal security and academic freedom provided by the assurance that decisions about their employment will not be made on the basis of racial and ethnic classifications.

IV.

The Sixth Circuit Court of Appeals views this as "a school case tangentially involving segregation in public schools[.]". 746 F.2d at 1154. In school cases directly involving segregation—in which courts have found constitutional violations—there is no right to be instructed by a racially balanced faculty or to be taught by race-alike role models. *See Oliver*, 706 F.2d at 762; *see also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 433-435 (1976). Here, there is no "condition that offends the Constitution." *Swann*, 402 U.S. at 16.

The Court of Appeals also recognizes this as an employment case, applying the standards of *Steelworkers v. Weber*, 443 U.S. 193 (1979). In employment cases, the remedial use of racial classifications is appropriate to "make whole" identifiable discrimination victims, *see*

Teamsters v. United States, 431 U.S. 324 (1977), and has been held to be acceptable to address a "conspicuous racial imbalance in traditionally segregated job categories" in the private sector. *Weber*, 443 U.S. at 209. Here, there are no identifiable discrimination victims. Nor is there any "conspicuous racial imbalance" as measured by the relevant labor market, the standard used in employment cases. *See Weber*, 443 U.S. at 197; *Hazelwood School District v. U.S.*, 433 U.S. 299 (1977).[13]

Here, the only "racial imbalance" or "segregation" is that measured by a difference between the percentages of minority teachers and minority students. This difference is significant, say the decisions below, because of the "vitally important" educational need of minority students for a proportionally representative number of race-alike role models. This is without basis: it is not supported by the record, by professional literature or research or in any "finding" of the school board. The foundation of the decisions below is facile jargon and a sociological assumption expanded beyond supportable limits.

CONCLUSION

We believe that by any constitutional standard it is impermissible for a public employer to pursue "minority balance" by depriving one group of teachers of employment while preserving the employment of other teachers because some are "minority group personnel" and some are not.

We believe that under any constitutional standard, Jackson's layoff plan violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

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[13] See discussion in note 11 of this brief.

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, RICHARD SURBROOK, President, DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In 1972, the Jackson, Michigan School Board decided that the racial composition of the faculty in each of its elementary and secondary schools ought to be the same as the racial composition of the student body as a whole. In order to achieve this goal, the School Board negotiated a collective bargaining agreement with the teachers' union under which minority applicants were to be preferred for new positions until the percentage of black teachers increased from its 1972 level of approximately 8% to the level of black student enrollment (approximately 16% in 1972). The agreement also provided that layoffs would be according to seniority, except that more senior white teachers would be laid off out of turn whenever that was necessary to prevent the percentage of minority teachers from declining.

In 1981, almost a decade after the adoption of this plan, ten white teachers were laid off out of turn so that less senior black teachers could be retained. The courts below held that these layoffs did not violate the plaintiff teachers' Fourteenth Amendment rights to equal protection.

The question presented is whether a school board may voluntarily adopt a racially segregated layoff system which abrogates the seniority rights of innocent employees when

a) the record is devoid of any evidence that there had been racial discrimination in hiring at any relevant time in the past; and therefore

b) the plan was not tailored to ensure that only actual victims of past discrimination in hiring were given preferential seniority rights.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, RICHARD SURBROOK, President, DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of B'nai B'rith, the oldest civic service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and

races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they members of a minority or the majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.* 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *De Funis* v. *Odegaard,* 416 U.S. 312 (1974); *Runyon* v. *McCrary,* 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transport Co.,* 427 U.S. 273 (1976); *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978); *County of Los Angeles* v. *Davis,* 440 U.S. 625 (1979); *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979); *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980); *Boston Police Patrolmen's Ass'n, Inc.* v. *Castro,* 461 U.S. 477 (1983); *Palmore* v. *Sidoti,* 104 S. Ct. 1879 (1984); and *Memphis Fire Department* v. *Stotts,* 104 S.Ct. 2576 (1984).

In all of these cases, the Anti-Defamation League has taken the position that each person has a constitutional right to be judged on his or her individual merits, rather than as part of a particular racial or ethnic group. A necessary corollary of this view is that employment preferences can never be accorded to all members of a particular minority on a class-wide basis even as a remedy for employment discrimination; instead, any such preferences must be carefully limited to those who have in fact been the victims of discrimination in employment.

The Anti-Defamation League shares the concern of the courts below that school boards be permitted to build racially diverse faculties responsive to the needs of all their students. Alternatives supported by the Anti-Defamation League to achieve this result include outreach programs to identifiable underrepresented minorities, special training and educational assistance for deprived applicants, and the consideration of merit-based alternatives to strict seniority systems. However, the Anti-Defamation League urges this Court to reject the concept adopted in the decision below that a school board is entitled to employ permanent quotas in order to create and maintain racial proportionality between teachers and students.

Such a concept is wholly contrary to the basic constitutional principles that all persons are entitled to be free from discrimination on grounds of race, religion, creed, sex or national origin, and that each person has a right to be judged on the basis of his or her own individual merit — not on the basis of the ethnic or racial group to which he or she happens to belong. It is these fundamental principles that form the basis for our argument for reversal of the decision below.

STATEMENT OF THE CASE

Jackson is a community of about 150,000 in south-central Michigan. The district judge found that prior to 1953, there were no black teachers employed by the Jackson public school system. *Wygant* v. *Jackson Board of Education,* 546 F. Supp. 1195, 1197 (E.D. Mich. 1982). By 1969, 15.2% of the student population and 3.9% of the faculty was black. At that point, the School Board began considering increasing its hiring of minority teachers. Over the next two years, its efforts to hire minorities increased the representation of minorities on the faculty to between 8.3% and 8.5%; during that time the black student population remained fairly constant. 546 F.Supp. at 1201. Although no evidence concerning work-force statistics

was introduced below, United States census figures show that in 1970 blacks comprised only 3.94% of the labor force in the Jackson, Michigan standard metropolitan statistical area, 2.01% of persons in that area with four years or more of college education and 2.64% of the area's elementary and secondary school teachers.[1]

In 1972, racial tensions led to violence at Jackson High School. A few months later, the School Board proposed a collective bargaining agreement under which racial preferences in hiring would be used to increase the percentage of black teachers in each of its schools to match the percentage of minority students in the Jackson school system as a whole. To protect these new minority hirees from layoffs, the Board proposed a change in the "last hired-first fired" provision of the collective bargaining agreement, requiring white teachers to be laid off out of turn when layoffs based on seniority would reduce the percentage of minority teachers. Despite the opposition of 96% of its members to such a provision, the teachers' union finally agreed to this proposal and the collective bargaining agreement was amended to provide as follows:

> "Article XII.B.1 In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff*. . . . Each teacher so affected will be called back in reverse order for positions for which he is certificated *maintaining the above minority balance.*" (Emphasis supplied.)

[1] ~~See Appendix A (chart with census figures)~~. Census figures are a proper subject for judicial notice. See *Rose* v. *Mitchell,* 443 U.S. 545, 571 n. 11 (1979); *Castaneda* v. *Partida,* 430 U.S. 482, 486 n. 6 (1977); *Hernandez* v. *Texas,* 347 U.S. 475, 480 n. 12 (1954); *Goins* v. *Allgood,* 391 F.2d 692, 697 (5th Cir. 1968) ("the courts take judicial notice of the census figures"). See also *United Steelworkers of America* v. *Weber,* 443 U.S. 193, 198 n. 1, 204 n. 4 (1979) (taking judicial notice of exclusion of blacks from craft unions and of unemployment statistics).

This provision remained in the collective bargaining agreement throughout the 1970's. Although it is not entirely clear what statistics are in the record, it appears that the percentage of minority teachers had increased to approximately 13.4% by the 1981-1982 school year. By 1982, the minority student population had increased to approximately 26%.[2] The 1980 census figures indicate that blacks were still a relatively small percentage of the relevant work force—4.2% of elementary and secondary school teachers—and an even smaller percentage of college educated workers (2.96%) and of the workforce as a whole (3.98%) in the Jackson area.

In 1981, ten white teachers were laid off out of turn solely because of their race under the terms of the collective bargaining agreement. They brought suit in the United States District Court for the Eastern District of Michigan challenging their layoffs as violative of the Constitution and the federal civil rights laws.

The district court granted the School Board's motion for summary judgment, dismissing plaintiffs' Title VII claims on the ground that they had failed to exhaust their administrative remedies and holding that the affirmative action plan did not violate the Equal Protection Clause of the Fourteenth Amendment.[3] In ruling on plaintiffs' equal protection claim, the court applied the standard set forth in *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979), for judging the legality of privately negotiated affirmative action plans under Title VII, holding that the School Board need only demonstrate that its use of a racially segregated seniority system was " 'substantially

[2] See Sixth Circuit Joint Appendix at 15; Table A to Petitioners' Brief.

[3] Plaintiffs also challenged their layoffs as violative of the Civil Rights Act of 1866, 42 U.S.C. § 1981; the district court held that the statute incorporated the constitutional standard and therefore dismissed that claim as well.

related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation" of minorities. *Id.* at 1202. In determining that there was "substantial and chronic underrepresentation" of minorities on the Jackson faculty, the court compared the percentage of minority teachers to the percentage of minority students. It did so on the ground that

> "... teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role models." 546 F. Supp. at 1201.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, reasoning that the discriminatory layoff policy was "a voluntary affirmative action plan designed to remedy past obvious race discrimination and to meet the practical problems posed by racial tensions engendered by that history." *Wygant v. Jackson Board of Education,* 746 F.2d 1152, 1159 (6th Cir. 1984). One judge concurred, noting that under decisions of this Court and the Sixth Circuit itself, the student population was the wrong yardstick by which to measure discrimination in the hiring of teachers. Although acknowledging that the trial judge should have instead compared the percentage of black teachers to the percentage of blacks in the relevant labor force, the concurring judge voted to affirm because there was no evidence in the record that there was *not* a conspicuous disparity if this comparison were taken into account.

SUMMARY OF ARGUMENT

As set forth in the Statement of Interest, the Anti-Defamation League has always opposed the use of quotas and other types of class-wide racial preferences as remedies for past

discrimination because such remedies ignore the rights of individuals, treating them only as components of a particular racial or ethnic group. The race preferential practices instituted in the Jackson School System are particularly disturbing because they illustrate the inevitable abuses which arise from the group rights concepts; these practices bear no relation to legitimate affirmative action.

It is beyond question that the racial preference at issue here was not and was not intended to be a remedy for past discrimination in hiring. There was no evidence in the record below of any discrimination in the hiring of minority teachers at any relevant point in time. On the contrary, when the proper comparison is made between black teachers in the school system and blacks in the workforce, there was not even a statistical disparity in 1972 when the plan was adopted. Nor was there any disparity in 1981 when the plaintiffs were laid off. A fair inference from the opinions below is that the affirmative action plan was adopted not to remedy discrimination in hiring but rather to cool racial tensions in 1972.

The use of racial preferences cannot be justified by the fear of student unrest. Nor can preferences designed to match the percentage of black teachers to the percentage of black students be sustained on the ground that black children need black teachers as role models. At best, this is another form of the argument that each racial group has a right to some type of proportional representation in public employment. At worst, it is a rejection of the concept of equality in education that lies at the heart of this Court's desegregation cases.

The preference at issue here also cannot be justified on the theory that the Fourteenth Amendment protects only racial minorities or that the white teachers as a group waived their rights by agreeing to the collective bargaining agreement. The Equal Protection Clause protects all individuals, regardless of race, from state-sponsored racial discrimination. The rights conferred by the Amendment are personal and cannot be

waived by others simply because they belong to the same racial group.

Finally, even assuming that there had been some type of past discrimination in employment for the School Board to remedy in this case, the use of the class-wide preference at issue here cannot be justified. *Memphis Fire Department* v. *Stotts,* 104 S.Ct. 2576 (1984), held that a court could not order the use of a racially-segregated seniority system in order to protect gains in minority hiring achieved under a consent decree. We urge the Court to apply the same principle to "voluntary" affirmative action plans, allowing a public employer to extend super-seniority only to those employees that it has appropriately determined to have been victims of past employment discrimination.

ARGUMENT

I. THE JACKSON SCHOOL BOARD'S DISCRIMINATORY LAYOFF POLICY WAS NOT REMEDIAL AND HENCE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Jackson School Board's layoff policy discriminated against white teachers solely because of their race. It is beyond dispute that such "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). As a result, this Court has declined to uphold racial preferences in employment absent a clear demonstration that they are appropriately tailored to remedy past discrimination in the workforce in question and do not unduly trammel the rights of individual members of the race disfavored by the classification.

Where the employer is a governmental entity and equal protection principles therefore apply, this Court has required the employer to bear a particularly heavy burden of justification. As this Court has held, "A core purpose of the Fourteenth Amendment was to do away with all governmentally-imposed discrimination based on race .... Such classifications are subject to the most exacting scrutiny; to pass constitutional muster they must be justified by a compelling governmental interest and must be necessary ... to the accomplishment' of its legitimate purpose." *Palmore v. Sidoti,* 104 S.Ct. 1879, 1881-1882 (1984) (citations omitted and footnote omitted.)

It is not enough in such cases for the employer to show that its plan tended to have a remedial effect; the plan must also be based on findings by a competent body that discrimination did in fact exist. As Justice Powell stated in *University of California Regents v. Bakke,* 438 U.S. 265, 307 (1978), this Court has

"never approved a [government] classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."[4]

Very few racial classifications can survive the scrutiny required by the Fourteenth Amendment. In fact, since approving the detention of Japanese-Americans during World War II, this Court has approved only one law which discriminated on the basis of race. In *Fullilove v. Klutznick,* 448 U.S. 448 (1980), this Court upheld a federal law that set aside 10% of the federal funds granted for local public works projects for minority contractors. This federal program, however, was based on congressional findings that past *intentional* discrimination against minorities had caused a "marked disparity in the percentage of public contracts awarded to minority business enterprises." *Id.* at 478. (Opinion of Burger, C. J.)[5]

[4] See also *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* 454 U.S. 1124 (1981), where the court stated that:

> "Because the justification for race-conscious affirmative action is remedying the effects of past discrimination, a predicate for the remedy is that qualified persons make findings of past discrimination before the plan is implemented. ***Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate.*** Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action." (Emphasis supplied.)

[5] In his concurring opinion, Justice Powell agreed that "purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." *Id.* at 506. He concluded that "enactment of the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination." *Id.* at 508.

A. The School Board's Racial Preference Was Not Designed To Eliminate A Conspicuous Racial Imbalance Caused By Past Intentional Discrimination.

The Jackson layoff policy stands in marked contrast to the affirmative action plan this Court approved in *Fullilove.* When the Jackson racial quota was adopted, apparently in response to student unrest, there were no findings by either the School Board or anyone else that past intentional discrimination against minorities had caused a manifest racial imbalance in the Jackson teaching staff. Although they clearly bore the burden of justification, the defendants also did not present evidence on this issue in their motion for summary judgment.[6]

Furthermore, there was no conspicuous racial imbalance on the faculty in any relevant year. The courts below concluded that there was "obvious race discrimination" in hiring because there was a significant disparity between the percentage of blacks on the Jackson teaching staff and the percentage of blacks in the Jackson student body. *Wygant v. Jackson Board of Education,* 746 F.2d 1152, 1159 (6th Cir. 1984). There is no reason, however, to infer discrimination in the hiring of teachers from a difference between the percentage of minorities on the faculty and minorities in the student population. Statistics are considered relevant, although not dispositive, in employment discrimination cases on the assumption articulated in *International Brotherhood of Teamsters* v. *United States,* 431 U.S.

[6] As movants for summary judgment, the defendants bore the burden of showing the "absence of a genuine issue as to any material fact. . . ." *Adickes v. Kress & Co.,* 398 U.S. 144, 157 (1970). Thus, defendants' failure to tender employment statistics proving past discrimination required the denial of their motion even though plaintiffs also failed to provide the court with the appropriate statistics. *Id.* at 160 ("[W]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*") (emphasis in original, citation omitted)

324, 340-341 n.20 (1977), that even-handed hiring and promotion will eventually produce a workforce that has approximately the same racial composition as the workforce at large. Because teachers are selected from the relevant local labor force, and not from the student population, it is to that population that any comparison must be drawn.

In *Hazelwood School District v. United States,* 433 U.S. 299 (1977), this Court specifically rejected an attempt to use the student population as a basis for comparison in an employment discrimination case, holding that the workforce was the only relevant indicator:

> "There can be no doubt . . . that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that *a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.*" *Id.* at 308. (Emphasis supplied.)

See also *Oliver v. Kalamazoo Bd. of Educ.,* 706 F.2d 757, 762 (6th Cir. 1983), where the Sixth Circuit applied *Hazelwood* to reverse the very district court decision on which the district court in this case had relied as authority for the proposition that the student population could be used to measure discrimination.

In the instant case, according to United States Census figures, in 1970 the percentage of blacks in the "qualified public school teacher population in the relevant labor market" was between 2% and 3%. The percentage of blacks in the local labor force as a whole was a little less than 4% in 1970. In 1969, however, 3.9% of the total Jackson teaching staff was black; by 1972 the percentage of minorities on the Jackson teaching staff had increased to between 8.3% and 8.5%. These statistics do not evidence "obvious race discrimination" against blacks. If anything, they suggest the opposite. Thus, there was

no evidence of prior discrimination to justify the imposition of a "remedial" quota.[7]

Because there was no "conspicuous racial imbalance" on the Jackson faculty, there was no remedial basis for a racial preference under the analysis adopted in *Fullilove.* The same is true even if this Court were to follow the lower courts and apply the arguably more lenient standard set forth in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), in ruling on plaintiffs' claims under the Fourteenth Amendment.[8] In *Weber*

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[7] Even if there had been discrimination prior to 1969, the adoption of the quota used in this case would be inappropriate. This Court has held that a remedy must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley,* 418 U.S. 717, 746 (1974). Given that the percentage of blacks in the relevant local labor force was somewhere between 2% and 4%, it is plain that, even if there had been findings of discrimination prior to 1969, the remedial quota of 15.9% far overshot the mark. See *Williams v. City of New Orleans,* 729 F.2d 1554, 1562 (5th Cir. 1984) (en banc) ("quota's target of 50% blacks in all [police] ranks was unsupported by the record . . ." where "even if hiring and promotions on the [New Orleans Police Department] had been conducted free of racial considerations, by 1980 blacks would have comprised only 40.7% of all sergeants, 39.4% of all lieutenants, 37.4% of all captains, and 30% of all majors.")

[8] This Court has discretion to resolve this case on the basis of the federal civil rights laws even though the statutory questions decided below under Title VII and § 1981 were not included in the petition for certiorari. See, *e.g., Capital Cities Cable, Inc. v. Crisp,* 104 S.Ct. 2694, 2699-700 (1984); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 255-57 (1981); *Peters v. Kiff,* 407 U.S. 493, 495 (1972); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 319-21 (1971); R. Stern & E. Gressman, Supreme Court Practice 458-61 (5th ed. 1978).

That discretion has been exercised in circumstances very similar to those presented here. For example, in *University of California Regents v. Bakke,* 438 U.S. 265 (1978), this Court decided a racial

(Footnote continued on following page.)

this Court held that a private employer subject to Title VII could voluntarily adopt an affirmative action plan that used racial classifications if the plan was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 209. Courts interpreting *Weber* have made it clear that under Title VII, as under the Fourteenth Amendment, the employer must first demonstrate the remedial nature of its plan. Thus, in *Setser v. Novack Inv. Co.*, 657 F.2d 962, 968 (8th Cir. 1981), the court noted that:

> "The first burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial. Some indication that the employer has identified a racial imbalance in its work force is necessary *to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action.*" (Emphasis supplied.)

In this case, the School Board has utterly failed to meet its burden to establish the remedial nature of its racial classification.

B. The School Board's Racial Preference Cannot Be Upheld On The Basis Of Minority Students' Need for Minority Role Models.

The opinions below suggest that, even if there had not been past discrimination in the hiring of minority teachers, the School Board acted lawfully in laying off white teachers out of turn because it had another "remedial" goal: to ensure that

(Footnote continued from preceding page.)

preference case on the basis of Title VI of the Civil Rights Act of 1964, even though the California Supreme Court "focused exclusively upon the validity of the special admissions program under the Equal Protection Clause," *id.* at 281, and "the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964... [until this Court] requested supplementary briefing on the statutory issue." *Id.* at 281.

disadvantaged black students had an appropriate number of black teachers to serve as "role models." As the district court put it, "teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students." *Wygant v. Jackson Board of Education,* 546 F.Supp. 1195, 1201 (E.D. Mich. 1982). Therefore, in order to assure students racially compatible teachers, "the 'faculty ought to begin to approximate the percentage of minority students in the district.' " *Id.* at 1201.

It is beyond dispute that a school board may strive to create an integrated faculty that reflects, to a certain extent, the racial make-up of the community it serves. An integrated faculty is important not only for minority children, but also to give children of all races teachers of different racial and ethnic backgrounds they can look up to and admire. In this case, however, the School Board was not trying simply to create and preserve an integrated faculty. Rather, it was attempting to create and preserve a situation where the percentage of minority teachers would match the percentage of minority students.

It is difficult to imagine how respondents can demonstrate a compelling state interest in having the percentage of black teachers correspond exactly to the racial make-up of the student body. Certainly, black students do not have a right to have a black teacher.[9] On the contrary, this Court has held that students have an affirmative right to *non*-discriminatory selection of their teachers because "racial allocation of faculty denies [students] equality of educational opportunity...." *Rogers v. Paul,* 382 U.S. 198, 200 (1965) (per curiam) (matching

[9] Under Title VII the courts below have made it clear that customer preference is no defense to a charge of racial discrimination: "it is clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race." *Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982) (unlawful to discriminate against white female counselor in order to cater to the alleged preferences of black clientele for a counselor of the same race.)

students and teachers on the basis of race violates constitutional rights of students.)[10]

The theory that the racial makeup of a faculty should reflect the racial makeup of the student body is yet another example of the assumption in many of the quota cases that have come before this Court that each racial group has a right to its proportionate share of public jobs. As Justice Douglas pointed out in *DeFunis* v. *Odegaard*, this type of racial balance is simply not an acceptable goal:

> "The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . ." 416 U.S. 312, 342 (Douglas, J., dissenting from dismissal of case on mootness grounds).

The district court's justification of the need for racial balance in the context of teachers and students is particularly disturbing, however. Despite the obviously benign intent of the role model theory, its basic assumption—that black students are better off being taught by black teachers—bears an uncomfortable resemblance to the logic of *Plessy* v. *Ferguson*, 163 U.S. 537, 544 (1896), that segregated classrooms were desirable from the point of view of blacks as well as whites. Taken to its

[10] See also *Oliver* v. *Kalamazoo Board of Ed.*, 706 F.2d 757, 762-763 (6th Cir. 1983), where the court refused to sustain a court-ordered minority faculty quota based on approximate black student percentage, ruling that "[A]ll the remedy to which the students were entitled [was the] 'sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices' "; *Fort Bend Indep. School Dist. v. City of Stafford*, 651 F.2d 1133, 1137-1138, 1140 (5th Cir. 1981) (In determining whether a school has achieved "unitary" status, a court should not compare the racial composition of the school's teaching staff to the racial composition of the student body. The proper test is whether there has been "sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discrimina[tion]. . . .").

extreme, the role model theory could be used to justify the alignment of faculty along racial lines and the concentration of black students in particular classes for the purpose of ensuring appropriate role models.

It should also be noted that the role model theory is of doubtful validity as a matter of educational theory. The 1966 Coleman Report on Equality of Educational Opportunity found a positive correlation between minority student achievement and the teacher's verbal skills and level of experience. The Coleman Report also found that, even when controlling for such factors as teacher experience and teacher verbal skills, there was either no correlation or a slightly negative correlation between minority student achievement and the proportion of black teachers. *Id.* at 316-319.

These findings were reconfirmed some six years later by Professor Eric Hanushek of the University of Rochester in *Education and Race* (Heath 1972). Professor Hanushek found positive correlations between teacher verbal ability and minority student achievement and between the teacher's level of experience and minority student achievement. *Id.* at 78-88. Professor Hanushek also found a negative correlation between minority student achievement and "the percentage of students with a nonwhite teacher" in the previous year. *Id.* at 88.

In 1981 Professor Hanushek reviewed some 130 studies that followed up on the Coleman Report. See Hanushek, *Throwing Money at Schools*, 1 Journal of Policy Analysis and Management 19 (1981). He found that the "only reasonably consistent finding seems to be that 'smarter' teachers do better in terms of student achievement." *Id.* at 29.

This literature indicates that minority students perform better academically when their teachers are chosen on the basis of merit or seniority than they do when their teachers are chosen on the basis of racial compatibility. Thus, far from

vindicating the rights of minority students, "racial allocation of faculty denies them equality of educational opportunity." *Rogers v. Paul,* 382 U.S. 198, 200 (1965).[11]

The district court's role model theory, unsupported by the record and limitless in its implications, cannot justify departure from accepted principles of equal opportunity in education and employment. Teachers, like parents and step-parents, may be important role models for children, but the state has no legitimate business assigning role models on the basis of race. See *Palmore v. Sidoti,* 104 S.Ct. 1879 (1984) (state may not consider race of step-parent in deciding custody of step-child). See also *Loving v. Virginia,* 388 U.S. 1 (1967) (state may not discriminate against interracial marriages).

C. The School Board's Racial Preference Cannot Be Justified As Necessary To Forestall Racial Unrest.

The courts below also attempted to justify the racial preference at issue here as a legitimate way to meet "the practical problems posed by racial tensions. . . ." *Wygant v. Jackson Board of Education,* 746 F.2d 1152, 1159 (6th Cir. 1984). The desire to avoid racial unrest is an inadequate justification both on factual and legal grounds. As a matter of fact, racial violence in 1972 can hardly be used to justify racial discrimination a decade later. More importantly, this Court has clearly rejected the notion that racial discrimination may be justified by a desire to avoid racial unrest.

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[11] Professor James Coleman agreed when he told a Senate Committee in 1970:

> "I don't think it is a service to a child to have him subject to the same homogeneous environment that he has experienced throughout his early childhood, and that he experiences when he leaves school every day." (Hearings before the Select Committee on Equal Educational Opportunity of the United States Senate, 91st Congress 1970, p. 108.)

The reasoning of the courts below on this issue once again bears a disturbing resemblance to the logic employed by the Court in *Plessy v. Ferguson,* 163 U.S. 537 (1896). As in the instant case, the Court in *Plessy* reasoned that racial classifications in the classroom would avoid racial tension and thereby promote "the preservation of the public peace and good order." *Id.* at 550. In subsequent cases this Court has consistently repudiated arguments based on the fear and speculation that racial violence may occur unless a racial classification is imposed. See, *e.g., Buchanan v. Warley,* 245 U.S. 60 (1917), where this Court invalidated a Kentucky law forbidding blacks from buying homes in white neighborhoods:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.* at 81.

See also *Watson v. City of Memphis,* 373 U.S. 526, 535, 537 (1963); *Wright v. Georgia,* 373 U.S. 284, 293 (1963).[12]

Similarly, plaintiffs in this case cannot lawfully be laid off from their positions in the Jackson public school system on account of their race in order to avoid the speculative possibility of racially motivated disorder by others. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 104 S.Ct. 1879, 1882 (1984). "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypotheti-

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[12] The only modern exception to this line of authority is *Lee* v. *Washington,* 390 U.S. 333 (1968), which condemned racial segregation in prisons but implicitly authorized temporary racial classifications when necessary to prevent prison riots. Here, however, the temporary racial classifications have lasted for thirteen years beyond the last reported incident of unrest.

cal effects of private racial prejudice that they assume to be both widely and deeply held." *Palmer v. Thompson,* 403 U.S. 217, 260-261 (1971) (White, J. dissenting)

II. THE RACIALLY SEGREGATED SENIORITY SYSTEM UNDULY TRAMMELED THE RIGHTS OF INNOCENT THIRD PARTIES.

In addition to being remedial, a voluntary affirmative action plan that employs racial classifications must also avoid unnecessarily burdening the rights of innocent parties. As Justice Powell stated in his concurring opinion in *Fullilove:*

> "A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties." 448 U.S. at 514.

In the cases in which this Court approved race-conscious remedial programs, it determined that any injury to white employees' expectations of future benefits was offset by the need to counteract prior pervasive discrimination. The "expectations" that were frustrated involved an ability to compete for certain benefits such as new jobs, promotions, future contracts and the like. Thus, in *Fullilove,* Congress had foreclosed white contractors from bidding on only 10% of new federal contracts worth $4 billion, with waiver provisions in the event that qualified minority contractors could not be found. In his concurring opinion, Justice Powell concluded that any "marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the compelling governmental interest in redressing the [purposeful] discrimination that affects minority contractors." 448 U.S. at 515.

Similarly, in *Weber,* white employees were foreclosed from applying for half of the openings in a new craft training program. Because the craft training program was new, it did "not involve an abrogation of pre-existing seniority rights." *Id.* at 215 (Blackmun, J. concurring). Furthermore, far from

requiring the "discharge of white workers and their replacement with new black hirees," the plan offered new opportunities to black as well as white workers. Under these circumstances and in light of its purpose to remedy a conspicuous racial imbalance in traditionally segregated job categories, this Court concluded that the plan did not "unnecessarily trammel the interests of the white employees." 443 U.S. at 208.

Defendants argue that in this case too there was no improper burden imposed on innocent third parties. They point out that, by the time this case was argued before the Court of Appeals, only one white teacher, Wendy Wygant, "remained unemployed as a result of" the discriminatory layoff policy. Respondents' Brief in Opposition to Certiorari at 6. Therefore, defendants assert, the discriminatory policy "has worked to protect a minority balance without doing harm to the white majority." *Id.* at 6. Defendants also assert that Wendy Wygant's right to be free from racial discrimination was waived by her fellow white employees when they agreed to the collective bargaining agreement. Defendants thus echo the district court's statement that "[i]t is difficult for the court to conceive how a plan which has been voluntarily adopted by members of the JEA can invidiously trammel the interests of white teachers, a majority of the JEA." *Wygant v. Jackson Board of Education,* 546 F.Supp. 1195, 1202 (E.D. Mich. 1982).

There are a number of flaws in defendants' theory of group waiver and group injury. First, it must be remembered that, when originally polled, "[n]inety-six (96) percent of the teachers expressed a preference for the straight seniority system and opposed a system that would freeze minority layoffs." *Id.* at 1197. The teachers' union accepted the policy only after an unsuccessful strike. *Id.* at 1198.[13] Thus, the decision to sacrifice the rights of the most junior white teachers can hardly be

[13] It is unclear from the record below whether the seniority provision was an issue in the strike.

described as a wholly voluntary act on the part of the teachers as a group.

Second, the district court was wrong to regard "white teachers" as if they were a single entity capable of suffering injury or waiving their rights. Wendy Wygant is the plaintiff here; not "white teachers" or the "white race." The question for decision is whether Wendy Wygant (and the other individual plaintiffs) were discriminated against on the basis of their race in violation of federal law, not whether whites as a group were disadvantaged. The federal civil rights laws, like the Constitution, protect individuals, not racial groups. As the Court held in *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948), "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." See also *McCabe* v. *A., T., & S.F. Ry. Co.,* 235 U.S. 151, 161-162 (1914); *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U.S. 702, 708 (1978).

It would be a perilous course indeed for this Court to adopt defendants' logic and treat American citizens as if they were simply components of a racial majority that is not entitled to judicial protection because it is capable of protecting itself. This Court has always held that the civil rights laws apply to people of all races, protecting each individual's right to fair treatment. See *McDonald* v. *Santa Fe Trail Transport Co.,* 427 U.S. 273 (1976). Telling individuals that they have no personal rights and that to protect themselves from discrimination they must rely upon their political or economic power as a racial majority can only encourage them to ignore legal remedies and rely on the exercise of the group's power instead. The end result would necessarily be inimical to the goals of equal protection and individual liberty embodied in the Fourteenth Amendment.

When viewed from the perspective of the individual white teacher laid off out of turn, there is a drastic effect on the rights of that teacher. The burdening of individual white teachers on

account of their race was clearly not necessary to protect the rights of any individual who had been the victim of employment discrimination by the Jackson School Board. Even if such discrimination had existed prior to 1969, there is no evidence that any of the junior black teachers protected by the preference in 1981 were the victims of that discrimination. Instead, it is clear that the preference was created and drastic burdens imposed on innocent white teachers in order to maintain a certain type of racial balance.

Imposing burdens on public employees solely because of their race for the purpose of protecting one racial group's supposed share of public jobs is simply not permissible under our Constitution and civil rights laws.[14] Nor is it in the public interest. For even if the intent is benign, the allocation of benefits and burdens on a quota basis is inevitably destructive, postponing rather than hastening the day "when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove* v. *Klutznick, supra,* 448 U.S. at 516 (Opinion of Powell, J.).

III. THE REMEDY WAS NOT APPROPRIATELY TAILORED TO SERVE A REMEDIAL PURPOSE.

Where a court-ordered remedy is at issue, this Court has always required that the decree be narrowly tailored to fit "the nature and extent of the violation constitutionally" proved, *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420

[14] Title VII clearly prohibits the use of racially segregated seniority systems to maintain racial balance. As Senators Clark and Case, the bipartisan captains of Title VII, explained in their interpretative memorandum, under Title VII, even an employer who has discriminated before the effective date of the Act and as a result has an all-white working force "would not be obliged—*or indeed, permitted*—to fire whites in order to hire Negroes, . . . *or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" *Teamsters* v. *United States,* 431 U.S. 324, 350-351 (1977), quoting from 110 Cong. Rec. 7213 (1964) (emphasis added).

(1977); see also *General Building Contractors Ass'n, Inc.* v. *Pennsylvania,* 458 U.S. 375 (1982). In *Fullilove* and *Weber,* however, the Court took the position that where a voluntary affirmative action plan was involved, a certain degree of imprecision in the means of remedying past discrimination could be tolerated. Nevertheless, even in the context of a voluntary plan, there must be a reasonable relationship between the plan and "the objective of remedying the present effects of past discrimination." *Id.* at 480. (Opinion of Burger, C.J.) In *Fullilove,* the Court found that the necessary connection existed because "[t]he percentage chosen for the set-aside is within the scope of congressional discretion. . . . The choice of a 10% set-aside . . . falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." *Id.* at 513-514. (Opinion of Powell, J.) Moreover, the Court emphasized the temporary nature of the program: "As soon as the PWEA [public works] program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Id.* at 513. (Opinion of Powell, J.)

Similarly, in *Weber,* the Court noted that the plan was "a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force." *Id.* at 208-209.

In this case, the racial preference is neither temporary nor tailored with an eye toward remedying the effects of past discrimination. Instead, despite the fact that the percentage of black teachers in the school already far exceeded the percentage of blacks in the local labor force, the School Board decreed that the percentage of blacks should be increased to

15.9% in every school building and that to reach this quota, not only should blacks be preferred for new vacancies, but more senior white teachers should be laid off out of turn in times of cutback. In light of the fact that it was incorporated into every collective bargaining agreement from 1972 on, one can only assume that this "remedy" was intended to become a permanent feature of the Jackson school system.

A permanent quota cannot be justified as "remedial." As this Court explained in *Pasadena City Bd. of Education v. Spangler,* 427 U.S. 424, 436 (1976), when it invalidated a similar attempt to maintain a permanent quota:

> "[T]he District Court was not entitled to require the [School District] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity."

See also *id.* at 444 n. 1 (Marshall, J. dissenting, disapproving permanent racial quota). So too in this case, the Jackson School Board was not entitled to impose a permanent quota disadvantaging white teachers in perpetuity under the guise of remedying a prior "disparity."

The "remedy" in this case was also not reasonably tailored to cure the effects of past discrimination. In *Memphis Fire Department* v. *Stotts,* 104 S.Ct. 2576 (1984), this Court struck down a racially segregated seniority system imposed by court order on the ground that under Title VII a court may award super-seniority only to the identifiable victims of discrimination. *Stotts* left open the question whether the City of Memphis, as a public employer, could have voluntarily instituted a racially segregated seniority system for the purpose of maintaining gains achieved through an affirmative action plan.

Although *Stotts* is thus not controlling here, it does suggest what effects of past discrimination are remediable. While a court may accord a public employer a certain amount of leeway, under the *Stotts* rationale there must at least be

evidence that the employer in question made a reasonable attempt to identify the victims of discrimination and to give only those victims special seniority rights. In this case, there was no attempt whatsoever to connect the remedy to any arguable discrimination in hiring. Furthermore, as noted above, it is highly unlikely that the racial preference that was invoked to lay off the plaintiffs out of turn in 1981 actually assisted any person who had been a victim of discrimination prior to 1969.

Because it has no discernible connection to any wrong committed by the School Board, the remedy in this case must be overturned. As Judge Higginbotham noted in his concurring opinion in *Williams v. City of New Orleans*, 729 F.2d 1554, 1569 (5th Cir. 1984) (en banc), the goal of equal opportunity is not served by remedies that simply create new wrongs:

> "When we lose sight of the need to tie remedy to wrong, we confound the very principles we are striving to vindicate, because we impose burdens and confer benefits along racial lines with no assurance that we are thereby undoing the injustices of the past; rather ... we perpetrate new injustices in derogation of the right of those benefited and burdened alike to be treated as individuals."

CONCLUSION

Whatever the limits of legitimate affirmative action, it is plain that the Jackson quota plan and discriminatory layoff policy exceed the constitutional and legal boundaries set by this Court. Indeed, the scheme challenged here is not affirmative action at all. Rather, it is a naked racial preference designed to create and maintain a faculty whose racial make-up exactly reflects the racial composition of the student body. This Court has ruled it impermissible to use race as the determining factor in hiring, placement, or retention decisions. See *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978); *Memphis Fire Department* v. *Stotts*, 104 S.Ct. 2576 (1984). This is true whether the intent is to discriminate against minorities or to discriminate in their favor.

To strike down this scheme would still leave ample room for appropriate remedial efforts. But to uphold it would open a Pandora's Box of racial preferences, under which individual rights would disappear in favor of theoretical "fairness" to racial or ethnic groups.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, *et al.*,
Petitioners,

v.

JACKSON BOARD OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

This brief *amicus curiae* in support of petitioners is submitted with the written consents of counsel to all parties filed with the Clerk of the Court.

INTEREST OF AMICUS

Mid-America has an interest in the disposition of this case, which is before this Court on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The Foundation was organized to support the public interest in preserving the economic and political freedoms of our democratic society. The case before the Court presents an important question of both personal and property rights.

SUMMARY OF ARGUMENT

According to the standards promulgated by this Court in leading constitutional and Title VII cases, the findings of "discrimination" made by the Jackson School Board in the present case are inadequate to justify its initation of a race-based system of teacher layoffs. The facts of this case do not present any justification for adoption of minority preference on the basis of past constitutional or statutory violations, evidence of historical discrimination, or the existence of substantial, conspicuous or chronic minority underrepresentation on the Jackson instructional staff.

In addition, the Jackson School Board's layoff of senior nonminority teachers on the basis of race in order to avoid reduction in the percentage of minority faculty violates Title VII as construed by this Court, because such action unnecessarily trammels nonminorities' interests in retaining their jobs.

Finally, petitioners have a statutorily created property right in their seniority. Both the Michigan Civil Service statutes and Title VII foster expectations in seniority and protect seniority systems from claims of discrimination. The Jackson layoff provision takes this property right in seniority from the petitioner without due process or just compensation in violation of the Fifth and Fourteenth Amendments.

ARGUMENT

I. The Findings of "Discrimination" in this Case are Inadequate to Justify Adoption of a Voluntary Racial Preference Under Either the Constitution or Title VII.

Although neither *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) nor *Fullilove v. Klutznick,* 448 U.S. 448 (1980) specifies definitive principles for determining what circumstances justify an employer's adoption of minority preferential "affirmative action", guidance may be taken from the views expressed by individual members of the Court in these cases. In *Bakke,* Justice Powell stated that "[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." 438 U.S. at 310. In the same case Justices Brennan, White, Marshall and Blackmun indicated that they found no constitutional objection to preferential treatment of minority individuals where a review of findings by a body competent to act in this area reveals "a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities." *Id.* at 362.

In *Fullilove,* Chief Justice Burger, joined by Justices White and Powell, concluded that the Fourteenth Amendment permitted *Congress* to employ remedial racial criteria where an "abundant historical basis" existed from which the congressional finding of past discrimination in federal procurement could be adduced. 448 U.S. at 478. In addition to these constitutional tests, a majority of the Court has agreed that Title

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[1] Section 703(a)(1) of the Act, 42 U.S.C. § 2000e-2(a)(1) (1978), provides in pertinent part that "[i]t shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or

(Footnote continued on following page.)

VII of the Civil Rights Act of 1964[1] does not necessarily prohibit private employers from initiating voluntary affirmative action programs designed to remedy a "conspicuous racial imbalance in traditionally segregated job categories." *United Steelworkers of America v. Weber,* 443 U.S. 193, 209 (1979).

The Jackson School Board's race based preferential layoff provision at issue in the present case cannot pass muster under any of the above tests. Clearly, the plan cannot be justified under the "past violation" standard employed by Justice Powell in *Bakke.* There has never been any determination that employment practices in the Jackson school system have violated the Constitution or any federal statute. *See Wygant v. Jackson Board of Education,* Pet. Cert. App. 20, 546 F.Supp. at 1198. Just as clearly, the present program cannot meet the abundant historical basis and special competence of Congress criteria alluded to by the Chief Justice in *Fullilove.* Neither the circuit court opinion in this case nor any submission by the parties makes reference to any history of racial discrimination in Jackson's schools. The district court refers only to a single instance of "race tensions" at the Jackson High School in February, 1972. Pet. Cert. App. 20, 546 F.Supp. at 1198. This contrasts sharply with the extensive hearings and debates detailing "historic practices that have precluded minority businesses" from the public contracting process that this Court upheld as sufficient justification for congressional fashioning of race conscious remedies in *Fullilove.* 448 U.S. at 461. Further, the Jackson program cannot withstand scrutiny under the abovementioned underrepresentation and impeded access test articulated in *Bakke.* The record reveals that between 1969 and 1971 the percentage of minority faculty more than doubled while the minority student population remained roughly con-

(Footnote continued from preceding page.)

to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ."

stant. Pet. Cert. App. 21a, 41-42a. Thus there is no evidence that any minority underrepresentation on the Jackson faculty was "chronic", or that the access of minorities to teaching jobs was impeded.

In addition, the Jackson preferential teacher layoff plan patently fails to satisfy the *Weber* Title VII measure of the legitimacy of need for affirmative action. The program upheld in *Weber* sought to remedy an imbalance between the percentage of blacks in a metropolitan labor pool (39%) and the percentage of black craftworkers in a particular Kaiser Aluminum plant (1.83%)—a ratio of 21.3 to 1. 443 U.S. at 198-99. In the present case, the School Board seeks to justify its layoff policy as a remedy for imbalance (in 1971 figures) between the percentage of minority (Black, Native American, Latino, and Asian American) students (15.9%) and the percentage of minority faculty (8.5%) in the Jackson system—a ratio of 1.87 to 1. *See* Pet. Cert. App. 21a, 41a. This latter ratio certainly cannot qualify as "conspicuous" in comparison to the "*manifest* racial imbalance" present in *Weber.* 443 U.S. at 208 (emphasis added). As for the second prong of the *Weber* test, the record does not contain one iota of evidence regarding segregation in the teaching profession. This case simply does not present any conspicuous racial imbalance in a traditionally segregated job category. Therefore, there can be no justification consistent with Title VII for the Board's adoption of a discriminatory "remedy" for a problem that does not exist.

The history of the present case contrasts starkly with the typical cases where courts have upheld voluntary affirmative action on the basis of unambiguous, clearly documented findings of a need to remedy egregiously discriminatory situations. For example, in *Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), *cert. denied* 104 S.Ct. 703 (1984) the Sixth Circuit sustained a minority preferential hiring and promotion scheme initiated by the city Board of Police Commissioners to remedy "the *severe* statistical disparity" (in 1967 figures) between black representation in the Detroit Police Department (5%)

and in the community at large (40%). 704 F.2d at 889 (emphasis added). Although the court determined that the Board was correct in finding that the police department had employed "a consistent, overt policy of intentional discrimination against blacks in all phases of its operations," *Id.* at 888, its decision was not based upon evidence of the statistical disparity alone. Rather, the court reviewed the voluminous evidence presented at trial in the district court—which included departmental duty assignments from the 1960's showing the segregation of black and white squad cars and the exclusion of black patrolmen from white neighborhoods, history of a white officers' strike protesting departmental integration, specific testimony regarding exclusion of blacks from a meaningful role in the department, and corroborative studies by the Michigan Civil Rights Commission, the National Advisory Commission on Civil Disorders, and the President's Crime Commission, *Id.* at 889-90—to conclude that ["i]t is in cases like this one . . . *where the facts so clearly establish* the presence of calculated, prior discriminatory practices, that the need for such remedial programs is most acute." *Id.* at 901 (emphasis supplied). Clearly, the Jackson situation is wholly different from that involved in cases like *Bratton.*

The Jackson School Board, unlike the Detroit Board of Police Commissioners, has never made findings of past discrimination of any kind. Nor does the Jackson plan seek to remedy "severe" minority underrepresentation on its instructional staff: underrepresentation is significantly less among Jackson teachers than it was among the Detroit policemen in *Bratton.* Finally, in the present case, neither the School Board, nor any reviewing court—in sharp contrast to the history of *Bratton*—has made any findings to justify adoption of racial preferences other than the bald fact of a statistical disparity between percentages of minority teachers and students in the Jackson schools.

As one federal circuit has recently concluded in a situation factually similar to the case at bar, the existence of bald

percentage disparity is simply not adequate justification for the adoption of a procedure which unfairly discriminates against nonminorities because of their skin color. *Janowiak v. City of South Bend,* 750 F.2d 557 (7th Cir. 1984). In *Janowiak,* an unsuccessful white fire department applicant brought constitutional and Title VII challenges against a minority preferential hiring program initiated by the South Bend Board of Public Safety. The district court upheld the program, but the Seventh Circuit reversed. The Board had sought to justify its imposition of minority hiring quotas on the ground that the minority composition of the city (14.1%) was not reflected in minority representation in the police and fire departments (5.3%)—an underrepresentation ratio of 2.66 to 1. 750 F.2d at 528. That ratio is larger than the ratio in this case. However, the court of appeals analyzed this Court's leading constitutional and Title VII decisions, and concluded that "evidence of statistical disparity alone failed to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against nonminorities." *Id.* at 564.

To conclude, if reverse discrimination is to be tolerated in our society, it should only be accepted in cases where it is necessary to remedy a manifestly wrongful situation, as in *Weber* or *Bratton.* The present case, however bears little resemblance to these types of cases. The School Board plainly had no sound basis on which to discriminate between teachers of different races. The Jackson layoff plan satisfies none of the criteria this Court has previously formulated to allow deviation from our society's general rule of nondiscrimination. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of the University of California v. Bakke,* 438 U.S. at 291. The discriminatory layoff practice involved in this case, adopted only to balance a set of racial statistics in the Jackson school system and not to remedy the effects of any vestige of past or present wrong, cannot be justified under exacting examination. Accordingly, the judgment of the circuit court should be reversed.

II. Even if the Facts of This Case Justified Some Voluntary Affirmative Action, the Jackson Racial Preference in Job Layoffs Violates Title VII.

The landmark Title VII case in the area of voluntary affirmative action is *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), which held that Title VII does not always prohibit a private employer from voluntarily adopting a minority preferential affirmative action plan designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209. In *Weber* the Court upheld a collective bargaining agreement between the United Steelworkers and Kaiser Aluminum which provided for the preferential training of unskilled minority production workers to fill skilled craft positions. There was no evidence that either party to the agreement had ever engaged in racial discrimination, but it was found that at one particular plant only five craft workers out of 273 (1.83%) were black, although blacks comprised 39% of the local work force. To remedy this conspicuous imbalance, the agreement provided that production workers were to be admitted to a new training program on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black craftworkers in the plant approximated the percentage of blacks in the labor market. In denying relief to white production workers who claimed that the agreement violated their right to equal employment opportunity under Title VII, the *Weber* Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. Implicit in the Court's analysis, however, was the balancing of society's interest in remedying *gross racial imbalances* in the workplace against affected nonminority individuals' expectations of equal opportunity. *Cf. Lehman v. Yellow Freight Systems, Inc.,* 651 F.2d 520 (7th Cir. 1981).

In pursuing this balancing approach, *Weber* identified a number of factors relevant to the determination of a voluntary

plan's Title VII acceptability. Although the Court did not explicitly depict any of these factors as determinative, it did find all of them to be present in Kaiser Aluminum's plan. It thus seems likely that while the absence of any single factor is not necessarily fatal to a voluntary plan, the absence of several, as in the present case, indicates an impermissible remedial program. The key elements in *Weber*'s validation of the Kaiser plan were as follows. First, the plan was voluntary, collectively bargained, of temporary duration, and was designed to "break down old patterns of racial segregation and hierarchy." 443 U.S. at 208. Equally significant, the Kaiser plan did not unreasonably bar advancement of nonminorities because of their race (half of the new craft trainees were to be white), did not require the replacement of nonminorities by minorities, and did not require the maintenance of set percentages of racial representation in Kaiser's workforce, but rather the elimination of manifest racial imbalance. Most importantly, the Kaiser plan did not operate to take away existing expectations of white workers; rather, it established a training program from which neither whites nor blacks had benefited before. In sum, the linchpin of the *Weber* analysis seems to have been that the Kaiser plan did not "unnecessarily trammel the interests of the white employees." *Id.*

The layoff provision at issue in the present case clearly does not meet the criteria set out in *Weber.* A voluntary "affirmative action" *layoff* plan necessarily implies a far greater trammeling of nonminority individuals' interests than was found to be present in the training and *promotion* plan at issue in *Weber.* In *Weber*, white production workers had no vested right to be selected for a training program that did not exist before establishment of the affirmative action plan. Any interest they did have in such a program was diminished because "seniority [was] not in issue [and] the craft training program [was] new and [did] not involve an abrogation of pre-existing seniority rights." 443 U.S. at 215 (Blackmun, J. concurring). Obviously,

the Jackson plan, requiring layoff of tenured nonminority teachers, does abrogate preexisting seniority.

One federal court recently agreed with Justice Blackmun's opinion that a voluntary plan which tampers with ingrained seniority-based expectations presents difficulties not operative in the Kaiser plan validated by *Weber*. In *Hammon v. Barry*, No. 85-0782 (D.D.C. April 1, 1985) the district court sustained a Title VII challenge by white firefighters seeking to invalidate the District of Columbia Fire Department's voluntary affirmative action program. The plan, which mandated the one-time promotion of five blacks and subsequent proportional promotion on the basis of race, was disallowed because it failed to recognize the overriding importance of white firefighters' central expectations that promotion decisions would be based upon seniority and individual achievement. The court stated that:

> [w]hile *Weber* did provide for some degree of permissible 'trammeling' on the interests of white employees, this plan goes much further than did the plan in *Weber*. That case involved a 'quota' for placement of minority workers into a new in-plant craft training program. [443 U.S.] at 199. Because no such program had previously existed, the 'quota' did not deprive whites of rights they had previously enjoyed or of legitimate expectations they had earned. *Here, however, the plan seeks to deprive the white firefighters of a legitimate and long-standing expectation of an equal opportunity to advance into the supervisory ranks, an opportunity they have earned by serving the requisite minimum of five years in the department and scoring well on the promotional examination. The white firefighters have earned the right to expect to be able to reap the rewards of their many years of service and dedication, without having those rewards stripped away solely on the basis of race. Black firefighters have also worked hard, having to overcome a long history of racial prejudice. However, the fact of past discrimination alone is not enough to deprive innocent whites of their legitimate expectation of advancement. Any employee, in the public or private sector, who works hard and fulfills the requirements of his employment, has a legitimate expectation that he or she will be given a fair and equal opportunity to advance, based on merit and achievement. This is not something which can be taken away from him or her just because he or she happens to be of a particular race. As shown above, the plan makes race a mandatory consideration over merit, and thus unnecessarily trammels the interests of white firefighters. Id. at 203.*

Hammon, slip op. at 37 (emphasis by the court). It should be noted that the white teachers' interest unnecessarily trammeled by the agreement in the present case—the sheer retention of their jobs—is even greater than the interest in promotion protected by the *Hammon* decision.

As at least one observer has concluded, any court facing the issue involved in the present case that conscientiously examines the factors this Court found determinative in *Weber* must necessarily conclude that preferential layoff agreements violate Title VII. Note, *Alternatives to Seniority-Based Layoffs: Reconciling Teamsters, Weber, and the Goal of Equal Employment Opportunity*, 15 U. Mich. J. L. Ref. 523, 542 (1982). As the author points out, the only *Weber* criteria preferential layoff systems satisfy are that they result from voluntary collective bargaining and recite a remedial purpose. Beyond this, such systems depart noticeably from the Kaiser plan approved in *Weber*. For instance, advancement of white teachers is hampered to a greater degree under the Jackson plan than was advancement of white production workers under the Kaiser plan. In the latter case each white had access to 50% of the promotions, while in the instant case promotion is impossible for laid off employees. In addition, a preferential layoff plan could contribute to the replacement of nonminority by minority workers, as those laid off may seek alternative employment outside their chosen profession. Further, a plan like the Jackson agreement explicitly provides for maintenance of percentage representation on the basis of race despite *Weber*'s strongly implied disapproval of such arrangements. *Bakke*, of course, directly overturned the establishment of such percentage representation. These observations alone could justify this Court's reversal of the present court of appeals decision approving the Jackson agreement.

This Court explicitly stressed the narrowness of its inquiry in *Weber*, noting that "[t]he only question before us is the narrow statutory issue of whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences *in the manner and for the purpose provided in the Kaiser-USWA plan.*" *Id.* at 200 (emphasis supplied). Given this caveat, it would seem prudent to recall that nondiscrimination remains Title VII's general rule, and voluntary affirmative action a narrow exception.

Nevertheless, the circuit court in this case has failed to heed *Weber*'s direction to avoid a broad reading extending its holding to different sorts of voluntary plans covering dissimilar sets of circumstances. *Wygant v. Jackson Board of Education,* Pet. Cert. App. 2, 746 F.2d at 1152. As a result, the circuit court's analysis of *Weber* was too superficial to justify its conclusions; it simply failed to rigorously scrutinize the Jackson plan at issue in light of this Court's analysis of the Kaiser plan involved in *Weber.* For example, the appeals court did not even mention the *Weber* majority's suggested distinction between those plans which merely seek to eliminate manifest racial imbalance and those fashioned to maintain given percentages of racial representation. In addition, the court of appeals measured the legitimacy of the Jackson plan according to the "reasonableness" standard of *Detroit Police Officers' Ass'n. v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981), sustaining it as substantially related to the objective of correcting minority underrepresentation on the Jackson schools' faculty. 746 F.2d at 1157.

As the Sixth Circuit seemed to realize in an earlier case, however, "reasonableness" *per se* was not one of the criteria employed by the *Weber* Court in judging the Kaiser plan. *Bratton v. City of Detroit,* 704 F.2d 878, 884-85 (6th Cir. 1983), *cert. denied,* 104 S.Ct. 703 (1984). Finally, not only did the court of appeals apply a test not mentioned in this Court's

authoritative voluntary affirmative action precedent, it also failed to address the policy issues implicated in an extension of *Weber,* which involved somewhat peculiar affirmative action promotion measures, to cover a system of race-based preferential layoffs.

In conclusion, *Weber* validated the practice of voluntary affirmative action only in certain narrowly circumscribed circumstances; specifically, where such action does not unnecessarily trammel the interests of affected nonminorities. Nonminority individuals possess vastly greater interests in the retention of their jobs than in being trained for promotion or indeed, in obtaining a particular job in the first place. The court of appeals in the present case misapplied *Weber* and failed to attach sufficient weight to this crucial nonminority interest abrogated by the Jackson layoff policy. Recognition of the proper magnitude of this interest, in accord with the principles of *Weber* and of Title VII itself, mandates the nullification of Jackson's discriminatory program and the reversal of the circuit court's decision in the present case.

III. Petitioners have a Property Right in their Seniority, and the Jackson Layoff Provision Takes That Property Right in Violation of the Fifth and Fourteenth Amendments.

The individual's property right in continued employment and seniority is created by state and federal law. Decisions of this Court have recognized and protected this right. As a property right, seniority cannot be taken from the individual without due process and just compensation. U.S. CONST. amends. V, XIV.

Recently, this Court recognized the existence of property rights in continued employment. *Cleveland Board of Education v. Loudermill,* 53 U.S.L.W. 4306 (U.S. March 19, 1985). In *Loudermill,* this Court discussed the basis of the individual's property interest in his employment and quoted with approval from *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972):

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions

> are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Loudermill went on to hold that the respondent possessed a property right in his continued employment since the Ohio Civil Service Statute classified him as a "civil service employee" entitled to retain his position "during good behavior and efficient service," who could not be dismissed "except for . . . misfeasance, malfeasance, or nonfeasance in office." *Id.* at 4306 (citing Ohio Rev. Code Ann. § 124.34 (1984)). This Court determined that the statutory language fostered employee expectations and thus created the property right. *Id.*

In the instant case, the language of the Michigan Civil Service and Retirement Statute creates property rights comparable to those recognized in *Loudermill.* M.C.L.A. § 38.1 *et seq.* (1967).[2] Specifically, the Teacher's Tenure Act, M.C.L.A. § 38.71 *et seq.* (1967), was enacted for the purpose of protecting teachers from being discharged or demoted from continuing tenure except for reasonable and just cause. *Rehberg v. Board of Education of Melvindale,* 330 Mich. 541, 48 N.W.2d 142 (1951). Not only does the statute create a property right in continued employment, but it protects this right from alienation by explicitly stating that "no teachers may waive any rights and privileges under this act in any contract or agreement made with a controlling board." M.C.L.A. § 38.172 (1967).

The essential component of this property right is the individual's expectations of continued employment established by his or her seniority. The use of seniority systems in America developed from a need to protect these expectations, and today such systems are included in over two-thirds of collective bargaining agreements. U.S. Bureau of Labor Statistics, Dep't.

[2] M.C.L.A. § 38.101 provides in pertinent part that "discharge or demotion of a teacher . . . may be made only for reasonable and just cause. . . ."

of Labor, Bill No. 1888, "Characteristics of Major Collective Bargaining Provisions" (1974). "Seniority rights are essential in allocating job benefits and underscore the importance of the expectations workers have built during their length of service." Note, *Alternatives to Seniority-Based Layoffs: Reconciling Teamsters, Weber and the Goal of Equal Employment Opportunity,* 15 U. Mich. J. L. Ref. 521, 540 (1982). Furthermore, as one article points out seniority is the most valuable "capital asset" an employee can accumulate. Summers and Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession,* 124 U. Pa. L. Rev. 893, 903 (1976).

The Michigan statutes recognize the validity of the "right to seniority" as well, and reflect Title VII's insulation of seniority systems from claims of discrimination. Specifically, section 37.2211 of the Michigan Civil Rights Act expressly exempts different terms, conditions or privileges of employment pursuant to a bona fide seniority system from the Act's general prohibition of discriminatory treatment of employees. Elliot-Larsen Civil Rights Act, M.C.L.A. § 37.2101 *et seq.* (1977 Supp.). Moreover, the Michigan Civil Service statute mandates that for the purpose of promotion, "seniority shall be controlling" where other factors are equal. M.C.L.A. § 38.461. This preferential treatment of seniority by the Michigan statutes furthers public employees' expectations built up by their seniority status.

The individual's property right in seniority is also protected by specific provisions of Title VII. This is supported by the legislative history of Title VII as well as this Court's decisions which protect the seniority right.

Title VII on its face recognizes the validity and importance of the seniority system. Section 703(h) allows for different treatment of employees pursuant to a bona fide seniority system.[3] This exception to Title VII's general prohibition of

[3] Section 703(h) of the Act, 42 U.S.C. § 2000e-2(h) (1978), provides in pertinent part that "it shall not be an unlawful employ-

(Footnote continued on following page.)

different treatment of employees acknowledges that the individual's property right to bona fide seniority outweighs any countervailing group interest in uniform treatment.

In addition, the legislative history of Title VII makes clear that the 1964 Civil Rights Act was not to interfere with, or even to permit interference with seniority rights. *See, e.g.,* 110 Cong. Rec. 6566 (remarks of Senator Clark) ("Title VII does not permit interference with seniority rights of employees or union members."); 110 Cong. Rec. 7213 (memorandum prepared by Senators Clark and Case) ("Title VII would have no effect on seniority rights . . . [the employer] would not be obliged—or indeed permitted, to give [Negroes] special seniority rights at the expense of white workers."); 110 Cong Rec. 7207 (remarks of Senator Dirksen) ("[I]t has been asserted that Title VII would undermine vested rights of seniority. This is not correct."). The legislators recognized the individual's seniority right and labored to insulate this right from Title VII requirements.

This Court has acknowledged the "overriding importance" of an individual's interest in seniority when reviewing claims of Title VII violations. *American Tobacco Company v. Patterson,* 456 U.S. 63, 71 (1982) (citing *Humphrey v. Moore,* 375 U.S. 335, 346 (1964)). More significantly, in a 1977 landmark decision, this Court upheld a seniority system even though such a system perpetuated the effects of past discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). In *Teamsters,* the Court recognized the importance of the seniority system and emphasized that seniority systems, unlike other employment practices which may perpetuate the effects of past discrimination, do not violate Title VII if they are "bona fide" within the meaning of section 703(h). *Id.*

(Footnote continued from preceding page.)

ment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . ."

at 352. This Court described seniority rights as "vested," and reasoned that Title VII does not require abrogation of such "vested" rights notwithstanding their disproportionate impact on minorities. *Id.* at 353.

The layoff provision in the present case directly infringes on the petitioners' "vested" right in their seniority. Petitioners' claim of unlawful deprivation of these rights is supported by the recent line of cases headed by *Firefighters Local Union No. 1784 v. Stotts,* 52 U.S.L.W. 4767 (U.S. June 12, 1984), which protect seniority rights at the expense of some affirmative action plan.

In *Stotts,* the city of Memphis entered into an agreement, embodied in a consent decree, which attempted to increase the proportion of minority-group representation in the city fire department. Subsequently, the city announced layoffs of employees for economic reasons. The district court modified the consent decree to enjoin the city not to decrease the percentage of employees who were black, despite the city's seniority system. Consequently, some nonminority employees with more seniority than minority employees were laid off. The Sixth Circuit Court of Appeals approved the modification of the decree.

This Court reversed the decision and said that the appeals court overstated the authority of the district court to disregard a seniority system. 52 U.S.L.W. at 4770. The court stressed that Title VII does not authorize judicial imposition of quota remedies to benefit minorities at the expense of whites, and asserted that "mere membership in the disadvantaged class is insufficient to warrant a seniority award." *Id.* at 4772.

This Court refused to allow interference with seniority based layoffs in *Stotts,* even at the expense of undermining an uncontested remedial hiring provision which was enacted subsequent to a finding of past discriminatory hiring practices. In the instant case, the record reveals no finding of the existence of such practices. Therefore, the Jackson School Board has even less justification to circumvent seniority rights in a layoff provision than did the unsuccessful respondents in *Stotts.*

Lower courts have cited the *Stotts* ruling to protect seniority rights threatened by minority preferential employment practices. For instance, one federal district court reversed its earlier ruling and ordered compensation to white firefighters who were required to forfeit seniority as a result of an affirmative action plan embodied in a consent decree. *Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service,* 588 F.Supp. 716 (D.N.J. 1984). Another federal district court also reversed itself following the *Stotts* decision. That court dissolved a permanent injunction against the layoff or demotion of minority-group employees. *United States v. City of Cincinnati,* 35 FEP Cases (BNA) 676 (S.D. Ohio 1984).

Courts have distinguished *Stotts* to uphold rights acquired through affirmative action only in situations concerning *hiring* or *promotion* schemes. *See, e.g., NAACP v. Detroit Police Officers Ass'n,* 591 F.Supp. 1194 (E.D. Mich. 1984); *Van Aken v. Young,* 750 F.2d 43 (6th Cir. 1984) (promotion plan, unlike the plan in *Stotts,* did not deprive employees of vested seniority rights); *Vanguards of Cleveland v. City of Cleveland,* 753 F.2d 479 (6th Cir. 1985) (promotion plan upheld because it "plainly does not interfere with any seniority rights"). These courts have made the crucial distinction between legitimate affirmative action plans to hire and promote, and unconstitutional plans which, in the layoff context, unjustifiably attempt to deprive nonminorities of vested property rights in seniority.

In the present case, the circuit court ignored this important distinction. The minority preferential plan at issue involves layoff procedures which would favor minority employees with less seniority than nonminority employees, a practice clearly foreclosed by the reasoning of *Stotts* and its progeny. Nevertheless, the court of appeals in the case at bar distinguished *Stotts* by emphasizing that the Jackson plan was "voluntary". The court made this distinction without acknowledging that there is no evidence *petitioners* volunteered this abrogation of their seniority rights.

Property rights under the Fifth Amendment are expectancies or interests related to a thing. *United States v. General Motors Corp.,* 323 U.S. 373 (1945). The present petitioners' expectancies were of job security and continued employment due to their seniority. The layoff provision in the collective bargaining agreement was a "taking" of their property rights in seniority since the effect of the provision was to lay off nonminority teachers with greater seniority than minority teachers who were retained.

The Due Process Clause of the Fourteenth Amendment provides that certain substantive rights—life, liberty, and property—cannot be taken except pursuant to constitutionally adequate procedures. *Loudermill,* 53 U.S.L.W. at 4307. Due process requires at least some sound basis for remedial action before a discriminatory plan may be adopted. (See Argument Section I). In the present case, the Jackson plan exhibits no such basis. Therefore, the layoff provision violates the Fourteenth Amendment by depriving petitioners of their rights to seniority without due process.

In addition, even if the Jackson Board had a valid public purpose in not diminishing its percentage of minority teachers, the layoff provision is a violation of those portions of the Fifth and Fourteenth Amendments which prohibit the taking of private property for a public use without just compensation. *Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 236 (1897). One court has noted that

> [s]eniority rights are property rights, which when taken, must be paid for, just as private property must be paid for when taken.

Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service, 588 F.Supp. 716 (D.N.J. 1984). The layoff provision in the instant case provides for no remuneration or assurances of call back once an individual has been laid off. It simply is a taking of petitioners' property in their seniority, without compensation.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded for proceedings consistent with the rights of the petitioners.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, ET AL., PETITIONERS

v.

JACKSON BOARD OF EDUCATION, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment permits a public entity to grant certain public employees preferential protection against layoffs solely on the basis of their race or national origin, when there is neither a finding nor even evidence that these (or any) employees have been discriminated against by that entity.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS

v.

JACKSON BOARD OF EDUCATION, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The government has the responsibility for enforcing numerous statutes prohibiting discrimination on account of race or national origin[1] and, accordingly, has frequently participated in this Court, both as a party and as *amicus curiae*, in cases presenting constitutional and statutory claims of racial discrimination.[2]

STATEMENT

Before the 1972-1973 school year, the collective bargaining agreement between the board of education and teachers association of Jackson, Michigan, called for lay-

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[1] See, *e.g.*, 42 U.S.C. 2000h-2; 42 U.S.C. 2000e-5(f)(1); and Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980).

[2] *E.g.*, *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

offs on a strict seniority basis (Pet. App. 21a).[3] In 1972, however, the board signed a new pact requiring lay-offs on a racial and ethnic basis. Specifically, it agreed that "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff" (*id.* at 3a, 23a). The goal of this system was "to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools" (*id.* at 13a, 22a, 32a). The agreement defined "minority group personnel" as those "who are Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a).

Petitioners are Jackson teachers who were laid off in accordance with this provision while "minority" teachers with less seniority were retained. Petitioners brought suit in the United States District Court for the Eastern District of Michigan, claiming that the lay-offs violated the Equal Protection Clause; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; other federal civil rights statutes (42 U.S.C. 1981, 1983, and 1985); and various state laws. On cross-motions for summary judgment, the court dismissed all of petitioners' claims.

Addressing the teachers' Fourteenth Amendment claim, the court first held that a finding of discrimination was not a prerequisite for the racial and ethnic preferences granted by the collective bargaining agreement (Pet. App. 25a-27a). Instead, the court held (*id.* at 28a-31a) that the Equal Protection Clause was satisfied if (1) " 'there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities' " and (2) the affirmative action plan meets a test of "reasonableness," *i.e.*, is " 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation" (*id.* at 28a, 31a, quoting *Detroit Police Officers' Association* v. *Young*, 608 F.2d 671, 694, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981)).

[3] A poll of the teachers revealed that 96% favored retention of this system and opposed a freeze offering special protection against layoffs to minority group members (Pet. App. 21a).

Applying this test, the court found "substantial and chronic underrepresentation" solely because the percentage of minority students exceeded the percentage of minority teachers (Pet. App. 29a). The court reasoned (*ibid.*) that "minority teachers are role models for minority students." The court then held (*id.* at 31a-34a) that the lay-off quota met the test of "reasonableness" (*id.* at 31a).

The court ruled that petitioners' claims under 42 U.S.C. 1981, 1983, and 1985 failed because the lay-off provision was constitutional[4] (Pet. App. 34a-35a); that petitioners had not satisfied the administrative prerequisites for suit under Title VII[5] (Pet. App. 34a), and that dismissal of all the federal claims necessitated dismissal of the pendent state claims as well (*id.* at 36a).

The court of appeals affirmed (Pet. App. 2a-19a) in an opinion that adopted the district court's reasoning and extensively quoted from the district court's opinion (*id.* at 4a-10a).[6]

[4] The court also held (Pet. App. 36a) that the claim under 42 U.S.C. 1985(3) was defective for failure to allege a conspiracy.

[5] Petitioners were barred from suing under Title VII because they had not filed administrative claims with the Equal Employment Opportunity Commission. 42 U.S.C. 2000e-5(f)(1). Petitioners did not appeal the district court's dismissal of their Title VII claims. Moreover, at the time of dismissal, the statute of limitations for filing administrative claims (42 U.S.C. 2000e-5(e)) had already run. Accordingly, petitioners are now relegated to those claims grounded upon the Fourteenth Amendment.

[6] Judge Wellford concurred, but expressed disagreement with the majority's view that underrepresentation of minorities could be established by comparing the proportion of minority teachers to minority students rather than to minority representation in the relevant labor market (Pet. App. 15a-19a). He believed, however, that petitioners, as plaintiffs below, bore the burden of proving "the

INTRODUCTION AND SUMMARY OF ARGUMENT

As amicus curiae in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the United States argued that the Fourteenth Amendment "established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color." [7] The schoolchildren and their parents and guardians took the same position, contending that "the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power." [8] We make the same argument in the present case.

In this case, petitioners were laid off from their jobs as school teachers for the sole reason that they are white and the respondent school board, a governmental agency subject to the Fourteenth Amendment, had bound itself in a collective bargaining agreement to an absolute layoff preference for "employees who are Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a). There was no finding by the school board, the courts below, or anyone else, that members of some or all of these groups had been the victims of discrimination by the school board, by the City of Jackson, or by the State of Michigan. There was no inquiry into the reasons for whatever disparities existed between the representation of these groups in the teaching and the student bodies. All there is by way of justification for the racially based misfortune visited upon petitioners are references by the district court and the court of appeals to a history of "societal discrimination" (Pet. App. 4a, 25a), "underrepresentation" of minority teachers (*id.* at 6a-9a, 28a-31a), and the need to supply "role-models"

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percentage of qualified minority teachers in the relevant labor market" (Pet. App. 17a).

[7] U.S. Supp. Br. on Reargument at 115; see also *id.* at 22, 65 (Equal Protection Clause requires government to be color blind.).

[8] Br. for Appellants in Nos. 1, 2, and 4 and Resp. in No. 10 on Reargument at 21.

for minority students (*id.* at 8a, 29a-30a). So casual a waving aside of the fundamental Fourteenth Amendment principle of equal treatment for all persons regardless of race and of our republic's basic moral vision of the unity of all mankind cannot be countenanced.

First, the courts below drew a wholly unwarranted connection between the general history of racial discrimination in this country, and the statistical underrepresentation of minority group members in the teaching corps relative to the student body—without even the semblance of an attempt to relate that disparity to some pattern or practice of conduct by the school board. Second, there is the further step of using this suppositious discrimination to justify a remedy which further undoes the connection between wrongdoer and victim to allow a person, say of Asian descent whose ancestors suffered discrimination in the early history of California, to attain for that reason a concrete advantage over petitioners in Jackson, Michigan, in 1982.

The third and final step in the shambling logic of this enterprise would justify the explicitly racially based layoff of petitioners on the ground that this is necessary to provide "role-models" for minority group students. Stripped of its veneer of unsupported psychological and sociological conjecture, this justification can only mean one of two things. It may mean that black, Hispanic or Asian students learn better if they are taught by black, Hispanic or Asian teachers. Or it may mean that such students, conscious of the injustices done to the groups of which they are members, will draw encouragement and a practical moral lesson from seeing members of their own (or some other) minority group in positions of authority and respect. As to the first of these justifications, no evidence for such an empirical effect was ever suggested, let alone examined and subjected to criticism and refutation. As to the second, the moral conclusions it teaches beg the question at issue. For one must assume that these students will be aware of the very system of racial preference which delivers role models in sup-

posedly sufficient numbers. But what is the moral lesson that such a system teaches? Surely not that ours is a society in which each person can succeed as a result of his or her own work and talent. On the contrary, one may likelier suppose that such a system (its actual working laid bare) will teach a different and more sinister lesson: that one hundred and twenty years after the end of slavery government may still advance some and suppress others not as individuals but because of the color of their skin.

In this brief the United States shall argue, first, that the Fourteenth Amendment was intended to assure the equality before the law of all persons, of whatever race or group; second, that therefore any governmental action based on race or national origin bears the heaviest possible burden of justification; third, that racial quotas cannot lighten much less discharge this burden of justification by claiming to favor blacks or other disadvantaged groups and therefore claiming to be benign; and fourth, that compensating the victims of discrimination is consistent with these principles, as the compensation is directed to those who have actually suffered discrimination. Adherence to these constitutional principles is perfectly consistent with a benevolent social policy designed to provide fair opportunity and a sense of real equality to all persons.

ARGUMENT

THE JACKSON LAY-OFF QUOTA VIOLATES EQUAL PROTECTION

I. EQUALITY BEFORE THE LAW IS A FOUNDATIONAL PRINCIPLE OF AMERICAN GOVERNMENT

The United States' population is the most diverse in the world—indeed, probably in the history of the world. If present trends of immigration and population growth continue, racial and ethnic diversity will significantly increase in the remaining years of this century.

This diversity, potentially divisive and enervating, has proved to be a source of strength and cultural richness,

a concrete manifestation of the universality of the principles on which this country was founded. Central among those principles is the equality of all persons before the law, regardless of race, religion, or ethnic background. The Declaration of Independence proclaimed that America was different from other countries because: "We hold these truths to be self-evident, that all men are created equal * * *." The inscription on the front of this Court reads: "Equal Justice Under Law." This is the principle that as a matter of historical fact has unified the many minorities that make up our population. See N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* 3-32 (1975).

This concept finds binding legal expression in the Equal Protection Clause of the Fourteenth Amendment: no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause does not mention any of the characteristics that divide, such as race, religion, or national origin. It sees only "person[s]" and guarantees to every "person" the "equal" protection of the laws.

Equality before the law, so magnificent in principle, is often a difficult and uncomfortable concept in practice. There have always been and perhaps will always be voices seeking to carve out special exceptions to this principle based on history, prevailing social conditions, temporary need, or expediency. After the era of Reconstruction, such voices prevailed, and the true meaning of the Equal Protection Clause was long suppressed. In 1896, this Court approved the concept of "separate but equal" facilities for blacks and whites and thus upheld the arrest of Homer A. Plessy for occupying a railroad coach reserved for whites. *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). According to his petition, Plessy was seven-eighths white and one-eighth black, and "the mixture of colored blood was not discernible in him" (*id.* at 541). Under Louisiana law, he was black, although in other states he apparently would have been white (see *id.* at 552). Whether, if living today, he would be regarded as

black or white by the Jackson Board of Education is unclear. What is clear is that his Fourteenth Amendment rights as a person were violated. In one of the most famous and prescient dissents in the history of this Court, the first Justice Harlan wrote (163 U.S. at 559):

> [o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

This vision became the creed of the Civil Rights Movement [9] and eventually the nation.[10] It has informed and found expression in numerous decisions of this Court. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 191-192 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954). Under those cases, the status of most laws that discriminate on the basis of race or ethnic origin is perfectly clear. They are "constitutionally suspect" and subject to the "most rigid scrutiny." *McLaughlin* v. *Florida*, 379 U.S. at 191-193. As the Court affirmed only last Term, "to pass constitutional muster, [a racial classification] must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of its legitimate purpose." *Palmore* v. *Sidoti*, No. 82-1734 (Apr. 25, 1984), slip op. 4. Furthermore, a suspect classification must be precisely tailored. *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972); *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

Beginning with the case of *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), this Court opened a new chapter in

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[9] See page 4 & note 8, *supra*.

[10] See, *e.g.*, *Special Message to Congress on Civil Rights*, 1963 Pub. Papers of President Kennedy 221; *Radio and Television Remarks Upon Signing the Civil Rights Bill*, 1964 Pub. Papers of President Johnson 842, 843.

the constitutional history of racial and ethnic discrimination. What purportedly distinguished *DeFunis* from previous discrimination cases was that the victim, Marco DeFunis, Jr., was not a member of a "minority" group, at least as defined by the University of Washington Law School, *i.e.*, he was not "black, Chicano, American Indian, or Filipino" (*id.* at 320). Thus, discrimination against DeFunis, a Sephardic Jew from a relatively poor background,[11] was claimed to be "benign" and, in the judgment of the University, DeFunis could justly be called upon to sacrifice his aspirations for a legal career to serve the greater public good.

The present case falls into the same pattern. Here, petitioners lost their jobs as teachers because they are not "Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a). Those seeking to justify this discrimination must show either (1) that so-called "benign" quotas should not be governed by the same constitutional standards that govern other forms of racial and ethnic discrimination or (2) that measures like the Jackson lay-off quota can satisfy those tests. We will address these points in turn.

II. LAWS THAT DISCRIMINATE IN FAVOR OF SOME MINORITY GROUPS MUST SATISFY THE SAME CONSTITUTIONAL STANDARDS AS OTHER FORMS OF STATE-SPONSORED RACIAL AND ETHNIC DISCRIMINATION

A. This Court has rendered two decisions concerning the constitutionality of racial classifications adopted by governmental entities for the purpose of benefitting members of specified minority groups: *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). While neither case produced a majority opinion, a plurality of the Court appears to have concluded that state action grant-

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[11] J. Fishkin, *Justice, Equal Opportunity, and the Family* 90 (1983).

ing preferences to minorities must satisfy strict scrutiny like all other state-sponsored racial classifications.[12]

We fully endorse this conclusion because we see no valid justification for more lenient judicial scrutiny of laws that discriminate in favor of some minorities and against a residual category of "whites." The right to the equal protection of the laws is an "individual," "personal" right. *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). See also, *e.g.*, *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). Accordingly, this right applies equally to all persons "without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886); see also *Buchanan* v. *Warley*, 245 U.S. 60, 76 (1917). This right "cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-290 (opinion of Powell, J.); see also *DeFunis* v. *Odegaard*, 416 U.S. at 337 (Douglas, J., dissenting).

[12] This standard of review was stated by Justice Powell in *Bakke*, 438 U.S. at 290-291. Justice White joined this portion of Justice Powell's opinion (*id.* at 387 n.7). In *Fullilove*, Justice Stewart, joined by Justice Rehnquist, declared that racial and ethnic classifications are "inherently suspect and presumptively invalid." 448 U.S. at 523. Justice Powell agreed (*id.* at 496-497 n.1), and Justice Stevens declared (*id.* at 551) that strict scrutiny would have applied if a state legislature had enacted the *Fullilove* program.

Neither the Chief Justice nor Justice O'Connor has commented on the applicable standard of review in this kind of case. In *Bakke*, the Chief Justice joined Justices Stevens, Stewart, and Rehnquist in an opinion that did not reach the constitutional question (438 U.S. at 408-421). In *Fullilove*, his opinion relied on Congress's unique power to enforce the Fourteenth Amendment (448 U.S. at 472-473, 483).

Several members of the Court have advocated a somewhat less exacting standard, but they have nevertheless insisted on a "strict and searching" judicial inquiry (see *Bakke*, 438 U.S. at 362) (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment). See pages 18-19 & note 30, *infra*. Even this standard is stricter than the "reasonableness" test applied by the courts below (see Pet. App. 10a, 31a).

Equal Protection is a matter of "fundamental principle" and not simply "a matter of whose ox is gored." A. Bickel, *The Morality of Consent* 133 (1975).

B. The history of the Fourteenth Amendment does not support the constitutionality of measures discriminating against "whites." The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 *et seq.*, which was enacted by the 39th Congress shortly before it proposed ratification of the Fourteenth Amendment, sheds initial light on the meaning of the Equal Protection Clause in view of the common roots and purposes of these two measures.[13] Congress's unequivocal objective in pasing the 1866 Act was to prohibit official racial discrimination against blacks *or* whites. Section 1 of the Act (14 Stat. 27) guaranteed that "citizens, of every race and color, * * * shall have the same right * * * to full and equal benefit of all laws and proceedings for the security of person and property." Senator Trumbull, the Act's sponsor, declared that its object was to "break down all discrimination between black men and white men" and that it applied "to white men as well as black men." Cong. Globe, 39th Cong., 1st Sess. 599 (1866). As Senator Howard, later a framer of the Fourteenth Amendment, commented, "[i]n respect to all civil rights, * * * there is to be hereafter no distinction between the white race and the black race." *Id.* at 504.

The purpose and effect of the Equal Protection Clause were the same. As proposed in the Reconstruction Com-

[13] The 39th Congress considered the two measures simultaneously and enacted the Civil Rights Bill approximately two months before proposing ratification of the Fourteenth Amendment. One of the primary purposes of the Fourteenth Amendment was "to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land" and thus insulate them from repeal or invalidation. *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948); see also, *e.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968). In addition, Section 1 of the Act (14 Stat. 27) was a model for the Equal Protection Clause. Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. Rev. 131, 140 (1950).

mittee,[14] Section 1 of the Fourteenth Amendment prohibited all governmental discrimination "as to the civil rights of persons because of race, color, or previous condition of servitude." [15] Although the committee changed this language, it is apparent that it did not intend to alter the principle of racial equality before the law.[16]

This was confirmed in the opening speech by the House floor leader, Representative Stevens. Section 1, he explained, guaranteed individuals of both races exactly the same treatment by the states (Cong. Globe, 39th Cong., 1st Sess. 2459 (1866)):

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[14] Before Section 1 of the Fourteenth Amendment was cast in its present form, the 39th Congress considered several proposed Amendments that expressly and unqualifiedly proscribed racial discrimination. See B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 50 (1914); Cong. Globe, 39th Cong., 1st Sess. 1906 (1866).

[15] B. Kendrick, *supra*, at 83-84.

[16] Representative Bingham first sought unsuccessfully to add to this provision the present language of the Equal Protection Clause (B. Kendrick, *supra*, at 85), and Section 1 was adopted as it stood (by a vote of 10 to 2) (B. Kendrick, *supra*, at 86-87). Bingham later succeeded in adding as a new Section 5 all of what is now the second sentence of Section 1 (again by a vote of 10 to 2) (B. Kendrick, *supra*, at 87), but this was later deleted (B. Kendrick, *supra*, at 98-99). Finally, he convinced the committee to substitute this Section 5 for what was then Section 1. (This time the vote was 10 to 3) (B. Kendrick, *supra*, at 106). This history—with the committee voting at various times to adopt the original and ultimate versions of Section 1 separately and together—strongly suggests that the express meaning of the original version banning all "discrimination" by government "because of race [or] color" was regarded as incorporated within the version finally reported. For accounts of the committee proceedings, see 6 C. Fairman, *History of the Supreme Court of the United States—Reconstruction and Reunion* Pt. 1, at 1270-1274, 1281-1283 (1971); J. James, *The Framing of the Fourteenth Amendment* 103-116 (1956); H. Flack, *The Adoption of the Fourteenth Amendment* 65-69 (1965); H. Meyer, *The History and Meaning of the Fourteenth Amendment* 71-74 (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 40-45 (1955).

> Whatever law punishes a white man for crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all.

Later, he added (*id.* at 2766) that the Equal Protection Clause "abolishes all class legislation in the States" and "protects the black man in his fundamental rights with the same shield which it throws over the white man." In the Senate, the floor leader, Senator Howard, provided the same unequivocal explanation (Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

The deliberations on the Fourteenth Amendment also show that Congress specifically intended to protect two groups of whites who were in real danger of deprivation of civil rights. First, the term "person," rather than "citizen," was used in the Equal Protection Clause to encompass aliens. Although the earliest draft of Section 1 of the Fourteenth Amendment, introduced in December 1865 by Representative Stevens, applied only to "citizen[s]" (Cong. Globe, 39th Cong., 1st Sess. 14 (1865)), by February 1866 the Reconstruction Committee had approved a different version, offered by Representative Bingham, that guaranteed equal protection to all "person[s]." [17] Defending this amendment on the House floor, Bingham asked on February 28 (Cong. Globe, 39th Cong., 1st Sess. 1090 (1866)): "Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?" Nine days later, commenting on the use of the term "citizen" in Section 1 of the Civil Rights Act, he stated (Cong. Globe, 39th Cong., 1st Sess, 1292 (1866)) that discrimination against aliens was "as unjust as the unjust State legislation" against blacks.[18]

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[17] B. Kendrick, *supra*, at 62.

[18] Earlier, Representative Stevens, the floor manager of the Fourteenth Amendment, and Representative Conkling, another

In 1866, the overwhelming majority of aliens were white,[19] since the first sentence of Section 1 of the Fourteenth Amendment had confirmed that virtually all freed slaves were citizens.[20]

The other group of whites that Congress specifically wanted to protect were white Unionists in the South. When asked if the Amendment's sole purpose was to protect black freedmen, Bingham responded (Cong. Globe, 39th Cong., 1st Sess. 1088 (1866)) that it was intended "as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been rested from them under confiscation, and protect them also from banishment." See also *id.* at 1090-1091.

Those who argue that the history of the Reconstruction era supports the constitutionality of preferences for blacks rely chiefly on laws relating to the Freedmen's Bureau.[21] But whatever light these statutes shed on the intended meaning of the Equal Protection Clause, they do not support current measures containing racial and ethnic preferences. Rather, they are examples of compensation for actual, identified victims of discrimination. See Cong. Globe, 39th Cong., 1st Sess. 940 (1866) (remarks of Sen. Trumbull). They provided assistance, not to blacks generally, but to "freedmen," individuals

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member of the Reconstruction Committee, had made the same point. Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (remarks of Rep. Conkling); *id.* at 537 (remarks of Rep. Stevens).

[19] See Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States* Pt. 1, at 99, 106, 108 (1975).

[20] That provision states that all persons born or naturalized in the United States and subject to its jurisdiction are citizens. This applied to virtually all former slaves, since importation of slaves ended in 1808 (Art. I, § 9, Cl. 1).

[21] See Br. of NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae at 10-53 in *Regents of the University of California* v. *Bakke*, No. 76-811.

who were the victims of slavery.[22] Moreover, these laws also provided substantial assistance for white refugees; in fact, figures provided to Congress showed that two-thirds as many whites as blacks had received rations from the Bureau. Cong. Globe, 39th Cong., 1st Sess. 940 (1866).[23] It is thus difficult to discern in these laws any support for the constitutionality of current measures granting preferences, regardless of individual circum-

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[22] Supporters emphasized that newly freed slaves had special needs resulting directly from years of bondage. See Cong. Globe, 39th Cong., 1st Sess. 939 (1866) (remarks of Sen. Trumbull); *id.* at 630 (remarks of Rep. Hubbard).

[23] The initial act (Act of Mar. 3, 1865, ch. 90, 13 Stat. 507 *et seq.*) established for one year a "bureau of refugees, freedmen, and abandoned lands" (§ 1, 13 Stat. 507), authorized the Secretary of War to provide aid to "destitute and suffering refugees and freedmen and their wives and children" (§ 2, 13 Stat. 508), and permitted abandoned and confiscated lands in the Confederate states to be set aside for the use of "loyal refugees and freedmen" (§ 4, 13 Stat. 508).

The second act (Act of July 16, 1866, ch. 200, 14 Stat. 173 *et seq.*) extended the life of the bureau for two years (§ 1, 14 Stat. 173), continued aid to needy refugees and freedmen (§§ 2, 5, 14 Stat. 174), addressed various administrative matters (§§ 3, 4, 14 Stat. 174; § 15, 14 Stat. 177), confirmed tax sales of certain lands to blacks (§ 6, 14 Stat. 174), provided for the disposition and administration of other confiscated and abandoned land (§§ 7-10, 11, 14 Stat. 175-176), allowed freedmen to continue occupying certain land under an Army field order until after the harvest and receipt by them of compensation for any improvements (§ 12, 14 Stat. 176), and instructed the commissioner to cooperate with benevolent societies for the aid of freedmen (§ 13, 14 Stat. 176). Finally, Section 14 of the Act (14 Stat. 176), far from granting a racial preference, guaranteed the rights and immunities of "all citizens" in the Confederate states "without respect to race or color, or previous condition of slavery," and authorized military tribunals to enforce these rights.

In 1868, the Bureau was continued for an additional year (Act of July 6, 1868, ch. 135, 15 Stat. 83). In sum, the Freedmen's Bureau measures provide no examples of race-conscious relief for non-victims.

stances, to any black person or, even more remotely, to any member of other minority groups.[24]

C. Permissive judicial scrutiny of "benign" discrimination is sometimes defended on the principle that the courts have a special duty to protect minorities lacking political power. In the words of Dean John Hart Ely, a leading proponent of this view:

> When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice * * *.

Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 735 (1974); see also J. Ely, *Democracy and Distrust* 170-172 (1980). This argument has at least three major defects.

First, it greatly oversimplifies and distorts the meaning of the Equal Protection Clause, making it nothing more than an enforcement mechanism for one particular theory of democratic government. There is no evidence that those who framed, proposed, and ratified the Fourteenth Amendment had this theory in mind. Instead, they believed for a variety of reasons—including the fact that immutable characteristics such as race and ethnicity are almost never relevant to a legitimate legislative purpose—that racial and ethnic classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

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[24] Three other minor Reconstruction-era statutes have been cited as examples of race-conscious relief. One was a $15,000 appropriation "for the relief of freedmen or destitute colored people in the District of Columbia" (Res. 3, 15 Stat. 20). The others established special protective procedures to ensure that black servicemen in former slave states were not cheated of their pay by claims agents. It seems safe to assume that virtually everyone aided by these enactments was a direct victim of slavery or racial oppression.

Second, Ely's argument is an oversimplification because it unqualifiedly equates numerical majority with political power and assumes that minority groups are politically powerless. In reality, the distribution of political power in a democracy is considerably more complex. Governmental decisionmakers directly or indirectly answerable to the voters are not always responsive to the majority's wishes. In addition, interest groups representing small segments of the population are sometimes able to influence the enactment of measures favorable to the group's members but of doubtful benefit to the electoral majority.[25]

Third, this theory assumes the existence of a polity with a monolithic white majority and black minority. The United States, however, is a nation of many minorities [26] (many of which overlap) and many, many political jurisdictions—50 states and nearly 80,000 units of local government.[27] Racial and ethnic groups are unevenly distributed among these jurisdictions, causing the terms "majority" and "minority" to have varying meanings. In more than 75 counties, blacks exceed 50% of the population; in 37 counties, more than 50% of the population is Hispanic. In eight of the ten largest cities, blacks and Hispanics constitute a majority.[28] Asian-Americans substantially outnumber whites in Hawaii.[29] In many communities, individuals of other cohesive, traditionally disfavored groups constitute substantial voting blocs.

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[25] See Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Col. L. Rev. 557, 573-574 (1975).

[26] See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 185 (1977) (Burger, C.J., dissenting) ("the 'whites' category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the * * * interests of all 'whites' are even substantially identical").

[27] Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1985*, at 261 (105th ed. 1985).

[28] *Id.* at 25-26.

[29] *Id.* at 31.

Because of these factors, different groups, whether alone or in coalition, are in the majority in different jurisdictions. If the standard for constitutional scrutiny were to depend upon whether a preference benefited a "minority" or the electoral majority, the meaning of equal protection would have to vary from place to place and time to time and would thus acquire an "accordion-like quality." *DeFunis*, 416 U.S. at 343 (Douglas, J., dissenting). The courts would also be compelled to make a sensitive and sophisticated assessment of the real distribution of political power in each community. This is an inquiry for which courts are ill-suited.

These problems can be illustrated by attempting to apply this same theory to gender classifications. Should measures disadvantaging women be leniently reviewed because female voters outnumber male voters? Should measures disadvantaging men be leniently scrutinized because men occupy most electoral posts? This Court does not draw such distinctions but instead applies precisely the same level of judicial review no matter which gender is disadvantaged. See, *e.g.*, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723-724 & n.9 (1982).

D. Less stringent judicial scrutiny of racial preferences for blacks and members of some other minority groups is sometimes defended on the ground that such measures compensate for past wrongs or for what is termed "societal" discrimination. But this approach assumes that a measure is compensatory and relaxes scrutiny before accurately assessing whether that is so. In our view, nothing less than strict scrutiny can be trusted to determine whether a measure is truly compensatory.

The problems inherent in any approach less exacting than strict scrutiny are illustrated by the intermediate scrutiny test advocated by several members of this Court as the appropriate standard for reviewing purportedly compensatory preferences.[30] Applying this test, propo-

[30] See *Fullilove*, 448 U.S. at 517-521 (Marshall, J., concurring); *Bakke*, 438 U.S. at 324-379 (opinion of Brennan, White, Marshall, and Blackmun, JJ). Under this test, a racial or ethnic classification

nents have approved preferential benefits for individuals not shown to have suffered from any past discrimination;[31] preferential medical school admissions for members of minority groups that were already *overrepresented* in the student body;[32] and preferential treatment for minority businessmen whose economic resources and opportunities clearly exceeded those of the average citizen.[33] Indeed, this test has been found to allow both discrimination in favor of and discrimination against the very same minority groups—and all in the name of compensation.[34] These results dramatically illustrate the

"designed to further remedial purposes" must "serve important governmental objectives" and must be "substantially related to the achievement of those objectives." *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring). In addition, there must be some rational basis for concluding that the preferred groups are more deserving of compensation than the groups disfavored. (*Bakke*, 438 U.S. at 359 n.35 (opinion of Brennan, White, Marshall, and Blackmun, JJ.)).

[31] *Bakke*, 438 U.S. at 377-378 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Fullilove*, 448 U.S. at 517-521 (Marshall, J., concurring).

[32] This was true of Chinese- and Japanese-American students in *Bakke*. See Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 Cal. L. Rev. 171, 185-186 (1979).

[33] Compare *Fullilove*, 448 U.S. at 520-521 (Marshall, J., concurring), with *id.* at 538-539 (Stevens, J., dissenting).

[34] The statute in *Fullilove*, which some Justices would have tested and sustained under intermediate scrutiny (448 U.S. at 517-521) (Marshall, J., concurring)), gave a preference to all Spanish-speaking citizens (see *id.* at 459). By contrast, the admissions program in *Bakke*, which was likewise found to pass intermediate scrutiny (438 U.S. at 355-379) (opinion of Brennan, White, Marshall, and Blackmun, JJ.)), favored only "Chicanos," *i.e.*, Mexican-Americans, while all other Hispanics, including such groups as Puerto Ricans, Cubans, and Central Americans, were required to shoulder part of the burden of providing compensation (see *id.* at 274).

Such results are not a quirk of the particular test employed but are an inevitable consequence of attempting to provide compensation to groups rather than individual victims. Many groups have suffered substantial discrimination in this country. Putting aside the special case of past discrimination against blacks,

need for strict scrutiny to identify those measures that are truly remedial and compensatory.

E. A final argument for permissive scrutiny of measures discriminating in favor of certain minority groups would justify them in terms of their supposedly benign symbolism: such classifications, it is asserted, do not stigmatize or brand the victims as inferior.[35] This argument loses sight of the equal protection ideal that individuals should not be helped or hurt by government on the basis of race or ethnic background. Instead, this theory incorrectly suggests that the Equal Protection Clause is more concerned with the symbolism than the concrete effects of racial and ethnic discrimination—loss of money, a job, education, a place to live, etc.

This argument fails as well even on its own terms. A defense of racial preferences on "symbolic" grounds is perilously vague and subjective. See *Bakke*, 438 U.S. at 294-295 n.34 (opinion of Powell, J.). The symbolism of benign concern intended by the defenders of such schemes may not be the symbolism discerned by the schemes' beneficiaries and victims or the public at large. These may rather infer that in our society benefits and opportunities are not to be obtained by merit but by successful manipulation of the politics of racial and group patronage.

Nor does it seem possible to identify any significant generic differences between the potential symbolic effects of disabilities and preferences. A disability may be seen as a brand of inferiority, but a paternalistic preference

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it is very difficult to say with any assurance that any of the remaining groups suffered greater discrimination than the rest. A "rational" case can be made that each group is especially deserving; but it is doubtful that a substantially stronger argument can be made on behalf of any group. Accordingly, if there must simply be a rational basis for the choice of groups preferred in an affirmative action plan, governmental units are apparently free to pick and choose among minority groups as they wish. If anything more than a rational basis must be shown, it seems doubtful that any of the groups noted above can be preferred.

[35] See *Fullilove* v. *Klutznick*, 448 U.S. at 518 (Marshall, J., concurring).

may carry exactly the same symbolic meaning, as many members of this Court have noted.[36] A disability may single out a minority group and thereby endorse and even encourage public hostility towards its members. But, again, so may a preference; a preference may arouse sharp resentment among those who are not preferred.

F. In arguing for a unitary standard of review for all racial and ethnic classifications, we do not equate or confuse a measure like the Jackson lay-off quota with the vicious discrimination of the Jim Crow era. However, the Equal Protection Clause is not merely a protection against the most flagrant wrongs. It embodies a broad principle of equality that is subverted unless applied equally to all racial and ethnic classifications. A. Bickel, *The Morality of Consent* 132-133 (1975).

Laws granting preferences to members of enumerated minority groups are also far from benign in practical effect. Such preferences inevitably harm innocent individuals. Whether a Plessy is ejected from a railroad coach because he is one-eighth black or laid-off because he is seven-eighths white, the concrete wrong to him is much the same. Whether a DeFunis is excluded from law school because he is Jewish or because he is not "Black, American Indian, Oriental, or of Spanish descendancy," his personal aspirations are equally thwarted.

Preferences also perpetuate and foster racial and ethnic divisions. And in a pluralistic and democratic society such as ours, when preferences are granted to some groups, there is inevitable pressure for similar preferences to benefit every group that can mount a claim of past discrimination.

Racial and ethnic preferences necessarily mar the law with definitions of racial and ethnic types, laws that are disquietingly reminiscent of abhorrent measures enacted in other times and places.[37] And if preferences are sus-

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[36] See page 23, *infra*.

[37] See *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting).

tained, a ready-made legal framework is thereby created for racial and ethnic policies of more malevolent design.

III. THE JACKSON LAY-OFF QUOTA CANNOT SATISFY THE CONSTITUTIONAL STANDARDS APPLICABLE TO MEASURES CONTAINING RACIAL AND ETHNIC CLASSIFICATIONS

The lay-off quota adopted by the Jackson school board emphatically flunks the constitutional standards governing racial classifications.

A. The lower courts justified the Jackson measure in large part on the theory that it serves to provide "role models" for minority youths, but this superficially appealing justification is multiply flawed. In the first place, we believe that special wariness is appropriate whenever an attempt is made to justify a racial classification, not for the purpose of righting past wrongs, but simply because it is asserted that social institutions would work better or more smoothly. Variations of this argument prevailed in *Plessy* and *Hirabayashi*, with regrettable results. However, except for such wrong turns, the Court has consistently and soundly rejected calls that the equal-protection rights of individuals be sacrificed to serve some abstract societal good. See, *e.g.*, *Palmore* v. *Sidoti*, No. 82-1734 (Apr. 25, 1984); *Lee* v. *Washington*, 390 U.S. 333 (1968); *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958). For "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis* v. *Odegaard*, 416 U.S. at 342 (Douglas, J., dissenting).[38]

[38] The role model justification seems clearly inconsistent with *Palmore*, which held that a state court, in awarding custody of a child, could not rely upon the race of the divorced mother's new husband. Few would deny that a child's most important role models are usually his parents. Thus, if a state's interest in providing children with role models of the same race were sufficient to override the principle of racial equality contained in the Fourteenth Amendment, it would appear that a state court should at least be permitted to take the race of the new husband into account in awarding custody. But *Palmore* properly prohibited this practice.

In this case, the role-model justification adopted by the lower courts falls far short of sustaining the Jackson lay-off quota. We do not dispute the fact that young people benefit from positive role models. Nor do we dispute the fact that minority youths, disheartened by past and present discrimination, often need minority role-models. But it is most doubtful that the Jackson lay-off quota will serve or is needed to serve this goal.

The Jackson measure, like all racial preferences, may undermine, rather than foster, minority role models.[39] See *Fullilove* v. *Klutznick*, 448 U.S. at 545, 547 (Stevens, J., dissenting); *id.* at 531 (Stewart, J., dissenting); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 173-174 (1977) (Brennan, J., concurring in part); *Regents of the University of California* v. *Bakke*, 438 U.S. at 298 (opinion of Powell, J.); *DeFunis* v. *Odegaard*, 416 U.S. at 343 (Douglas, J., dissenting); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 17 & n.35. The most powerful role models are those who have succeeded without a hint of favoritism. For example, Henry Aaron would not be regarded as the all-time home run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate.

There are other, better ways for the schools to provide role models for minority youth. Any discrimination against minority teaching applicants can and should be stamped out. Minority group members who have achieved success in various walks of life can be invited and en-

The invalidity of the role-model justification in the present, weaker context would appear to follow *a fortiori*.

[39] As Professor Thomas Sowell has written (*Black Education, Myths and Tragedies* 292 (1972) (emphasis in original)):

> What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it*, and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy.

couraged to visit the schools and to discuss their careers and the students' aspirations. Courses of study can be developed so as not to overlook the notable contributions of minorities. The schools can and should ensure that teachers, of whatever race, are sensitive to the special needs of minority students. In view of these alternatives, the Jackson lay-off quota is not necessary to provide minority role models, and it accordingly cannot be justified on this ground. *Palmore*, slip op. 4; *Bakke*, 438 U.S. at 314-315 (opinion of Powell, J.). At the very least, the board has failed to carry its burden of showing a compelling educational need for its particular program, which (a) treats all "minority" and nonminority teachers as fungible for role model purposes,[40] (b) aims for rigid statistical parity between the percentage of minority students and teachers and (c) in the meantime, prohibits any layoff that would decrease whatever percentage of minority teachers happens to have been achieved at the time when lay-offs become necessary.

The role-model justification also beckons down forbidden paths. It is an argument for quotas in every profession and occupation, for minority students properly aspire to careers in every walk of life. The logic of the role-model argument might also serve to justify segregated classrooms. If the educational development of minority students urgently demands the presence in their schools of minority teachers to serve as role models—indeed demands the presence of minority teachers in mathematical proportion to the racial composition of the student body—then it is not easy to see why minority students would not be served best if they were actually taught by minority teachers. These dangerous implications are underlined by the fact that the role-model argu-

[40] It is far from obvious that a teacher belonging to one of the preferred minority groups is necessarily any more capable of serving as a role model for students belonging to another preferred group than is a teacher belonging to a disfavored group. For example, is it clear that black students will be more inspired by a teacher of Chinese or Japanese ancestry than by a teacher of Jewish or Lebanese heritage?

ment or variants of it have frequently been advanced as a defense by school boards charged with illegally segregating minority teachers in predominantly minority schools.[41] For example, in *Smith* v. *Board of Education*, 365 F.2d 770 (8th Cir. 1966), the school board argued that it could legally prefer white teachers to instruct white pupils because "rapport between teacher and pupil * * * may be unattainable where they are of different races and this difference affects attitudes, personal philosophies and prejudices." *Id.* at 781. The court, in an opinion by then Judge Blackmun, rejected this argument in unequivocal terms (*id.* at 782).

B. The lower courts also justified the Jackson measure as a cure for "substantial and chronic underrepresentation" of minority teachers. But the use of racial classifications for the sole purpose of curing statistical underrepresentation (or, in plainer terms, imposing quotas) is proscribed by the Fourteenth Amendment. As Justice Powell concluded in *Bakke* (438 U.S. at 307): "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." [42]

[41] See, *e.g.*, *Reed* v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979), cert. denied, 445 U.S. 935 (1980); *United States* v. *School District*, 521 F.2d 530 (8th Cir.), cert. denied, 423 U.S. 946 (1975); *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Arthur* v. *Nyquist*, 415 F. Supp. 904 (W.D.N.Y. 1976), aff'd and rev'd in part, 573 F.2d 134 (2d Cir.), cert. denied, 439 U.S. 860 (1978).

[42] In relying upon what they viewed as chronic underrepresentation of minority teachers to justify the Jackson lay-off quota, the lower courts were apparently confused by *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), in which the Court held that Title VII of the Civil Rights Act of 1964 was not violated by a provision in a private-sector collective bargaining agreement granting racial preferences in a craft-training program. *Weber*, however, has no application in the present case because it did not involve state action and thus did "not present an alleged violation of the Equal Protection Clause" (*id.* at 200). Moreover, even if ap-

C. 1. Finally, the lower courts justified the Jackson measure as a means to redress "societal discrimination." We readily agree that providing a remedy for individual victims of discrimination is a compelling interest, but measures granting preferences to all members of a few minority groups cannot be justified in the name of compensation for "societal discrimination."

In the first place, such measures are compensatory or remedial in name only. Because the Equal Protection Clause protects personal not group rights, a measure cannot be fairly characterized as a remedy for a violation of equal protection unless it provides relief to an individual who was personally victimized by discrimination. Nor can a measure be termed remedial if the benefit conferred is not in some way measured by the nature and extent of the prior violation. When benefits do not correspond to any identified prior wrong and are not directed to the victim of such a wrong, they cannot in any meaningful sense be termed compensatory or remedial.

For essentially the same reasons, categorical preferences can never be regarded as "precisely tailored" to remedy discrimination. Such measures are fatally underinclusive because the groups usually singled out for preferential treatment "are not the only groups that have been discriminated against in this country." Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 Cal. L. Rev. 171, 176 (1979). See also J. Fishkin, *Justice, Equal Opportunity, and the Family* 98-99 (1983); J. Wilkinson, *From Brown to Bakke* 278-279 (1979). Categorical preferences are also impermissibly overinclusive because "[i]n today's society, it constitutes far too gross an over-simplification to assume that every Negro, Spanish-speaking citizen, Oriental, [or] Indian * * * suffers

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plicable, *Weber* would not support the lower courts' decisions in this case because the record does not show that the percentage of minority teachers in the work force exceeded the percentage on the Jackson faculty (compare *Weber*, 443 U.S. at 198-199). In addition, in this case, unlike *Weber*, the racial preference caused the discharge of innocent non-minority employees (compare *id.* at 208).

from the effects of past or present racial discrimination." *Fullilove*, 448 U.S. at 530 n.12 (Stewart, J., dissenting); see also *id.* at 537-538, 546 (Stevens, J., dissenting). Indeed, it is one of the ironies of racial preferences that those who benefit are seldom the most disadvantaged. Many minority group members and some minority groups as a whole have now surpassed the residual category of "whites" in income, education, and other measures of success.[43] Furthermore, many individuals given preference under affirmative action plans, while perhaps disadvantaged in some respects, are not even the indirect victims of discrimination in this country. This is often true of recent immigrants who happen to fall into one of the preferred groups.

Precise tailoring requires that the remedy fit a proven violation of law. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Milliken* v. *Bradley*, 418 U.S. 717, 738, 746 (1974) (an equal protection remedy is "necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct"). This means, as Justice Stewart stated in *Fullilove* (448 U.S. at 530 n.12), that "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." Justice Stevens recognized the same principle in *Fullilove* when he observed (*id.* at 541) that the statutory preference could not "be justified as a remedial measure" for firms that had not been "wrongfully excluded from the market for public contracts."[44]

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[43] This is true, for example, of Chinese- and Japanese-Americans (see T. Sowell, *The Economics and Politics of Race* 49, 187 (1983)), groups that suffered severe de jure discrimination and are included among the minorities given preference in the Jackson lay-off quota.

[44] In *Fullilove*, neither the plurality opinion nor that of Justice Powell approved the award of benefits to non-victims at the expense of innocent third parties. In the plurality opinion, the Chief

No other remedial principle is compatible with the cardinal rule that government may neither favor nor disadvantage a person solely because of race or ethnicity. When government provides compensation to individual victims, government is not itself making or implementing a racial classification. The victims compensated may all be members of the same racial or ethnic group, but this is merely because the guilty party's unlawful behavior was defined by race.

Nor does any other remedial principle pay sufficient heed to the rights of innocent parties. Although a valid remedy for individual discrimination may require some sharing of the burden by innocent parties (*Fullilove*, 448 U.S. at 484 (plurality); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)), such individuals will simply be placed in the situation that would have existed had the discrimination not occurred. But unless a remedy benefits an actual victim of discrimination, "the government has [no] greater interest in helping one

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Justice stressed (448 U.S. at 486) that the Court was considering only a facial challenge to the minority set-aside provision and that equal protection claims arising out of specific awards that "cannot be justified * * * as a remedy for present effects of identified prior discrimination * * * must await future cases." The Chief Justice also emphasized Congress's intention that a preference should be given to only those firms "whose competitive position is impaired by the effects of disadvantage and discrimination" (*id.* at 471; see also *id.* at 464) and that the administrative process would prevent misapplications of Congress's goals (*id.* at 487-489). The *Fullilove* plurality did not suggest that the statute at issue in that case, which may have "pres[sed] the outer limits of congressional authority" (*id.* at 490), would have been upheld had it extended preferences to firms based solely on race rather than their "impaired * * * competitive position" resulting from the "present effects of past discrimination" in government construction contracts. None of these factors is present here. Petitioners were personally and substantially harmed by the lay-off quota, and no effort whatsoever was made to inquire whether those preferred at petitioners' expense were the actual victims of discrimination or disadvantage.

individual than in refraining from harming another" (*Bakke*, 438 U.S. at 309 (opinion of Powell, J)).[45]

2. The Jackson measure cannot be justified as a means of providing compensation for individual victims of discrimination. Neither the school board nor the courts below found that the board had ever engaged in discrimination. The absence of such a finding alone requires the invalidation of the lay-off quota. *Bakke*, 438 U.S. at 302-310 (opinion of Powell, J.); see also *Bushey* v. *New York State Civil Service Commission*, No. 84-336 (Jan. 7, 1985), slip op. 4 (opinion of Rehnquist, J., Burger, C.J., and White, J., dissenting from denial of certiorari).

Furthermore, the board does not have the constitutional competence to make a finding that justifies the use of a racial classification for remedial purposes. Like the Regents in *Bakke*, the Board's "mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." *Bakke*, 438 U.S. at 309 (opinion of Powell, J.). Factfinding by a state or local entity also cannot be equated with that of Congress because, among other things, the states are not granted the enforcement power under Section 5 of the Fourteenth

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[45] The same remedial principle guided the Court in its recent decision regarding the scope of a federal court's remedial authority under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984). With much the same values and interests at stake, the Court ruled that the policy behind the remedial provision of Title VII, Section 706(g), 42 U.S.C. 2000e-5(g), is to "provide make-whole relief only to those who have been actual victims of illegal discrimination." *Stotts*, slip op. 16-17; see also *Teamsters* v. *United States*, 431 U.S. 324, 367-371 (1977). This holding is particularly instructive since Title VII has been held to allow greater leeway for racial preferences than would be permitted for an entity subject to the Fourteenth Amendment. See *United Steelworkers* v. *Weber*, *supra*. Justice O'Connor implicitly pointed out the breadth of this principle when she wrote in *Stotts* (concurring slip op. 5 (emphasis added)), citing both Title VII and Fourteenth Amendment precedent, that "[a] court may use its remedial powers * * * only to prevent future violations and *to compensate identified victims of unlawful discrimination.*"

Amendment that many members of the Court found important in upholding the Act of Congress challenged in *Fullilove*. See 448 U.S. at 476-478, 483, 490-491 (plurality opinion); *id.* at 499-502 (opinion of Powell, J.); see also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976); *Bushey*, dissenting slip op. 4.

A court of equity may of course make a finding of racial discrimination, but no such finding could be made on the record in this case. The lower courts relied exclusively on statistics showing that there was a difference between the percentage of minority teachers and students during a brief span of years more than a decade ago. This difference, however, might have resulted from any of numerous innocent causes and unquestionably does not show the discriminatory intent needed to establish an Equal Protection Clause violation. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 (1977); *Washington* v. *Davis*, 426 U.S. 229, 243 (1976); *Janowiak* v. *City of South Bend*, 750 F.2d 557, 564 (7th Cir. 1985).

More fundamentally, as we have shown, even a finding that there had been past discrimination against *some* individuals would not support a *categorical* racial and ethnic preference such as that contained in the Jackson agreement. No findings, then, can justify the challenged Jackson measure. Even if the board or lower courts had found a constitutional violation (and they did not) and even if they were to find such a violation on remand (and they could not on the present record) the Jackson quota could not be supported.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1340

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE CITY OF DETROIT

CONSENT OF THE PARTIES

Petitioners and Respondents consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE CITY OF DETROIT

The City of Detroit, on whose behalf this brief is filed, is a municipality whose law enforcement agencies, particularly its Police Department, have worked hard to overcome past discrimination against minorities and women, and the debilitating effects that discrimination has had on the ability of the police to operate.

The interest of the City of Detroit stems primarily from the fact that it has instituted an affirmative action plan in its Police Department which has governed promotions in the Department since the plan was adopted in 1974. Detroit's race-conscious promotion program has thus far withstood two separate challenges under the Equal Protection clause and federal civil rights laws, *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), on remand, 36 FEP Cases, 1019 (E.D. Mich. 1984), appeal pending (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), modified, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984) (sustaining race-conscious promotions to the rank of lieutenant). In these cases, Detroit's race conscious promotion program has thus far been sustained after lengthy trial proceedings based upon voluminous trial records including comprehensive proofs by the City of Detroit of the circumstances warranting utilization of race-conscious measures. The case now before the Court presents the same constitutional question posed in Detroit's litigation—the constitutionality of race-conscious affirmative action measures in public employment—but without a record reflecting the circumstances which engendered the use of race-conscious measures by the Jackson Board of Education.

Also, since 1977, the Department has consistently urged the union representing Detroit's police officers to agree to a modification of inverse seniority—similar to the provision at issue here—so that minority and female representation would not be reduced through layoffs. The police union has withheld agreement asserting *inter alia* that such a provision would be unlawful and unconstitutional. Ironically, a district court has held the City of Detroit violated the Constitution, after the police union refused

the requested modification, by making police layoffs in 1979 and 1980 as dictated by the governing inverse seniority provision which the court specifically found to be *bona fide*, *NAACP v. DPOA*, 591 F. Supp. 1194 (E.D. Mich. 1984), appeal pending (6th Cir. No. 85-1126).[1]

Finally, the City of Detroit has pursued race-conscious measures in hiring in its Fire Department. Like the promotion measures in the Police Department, the race-conscious hiring program in the Fire Department survived challenge under federal civil rights laws and the Constitution after full trial and development of a comprehensive evidentiary record reflecting the program's purpose and justification, *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984).

As set forth below, the City of Detroit believes the constitutionality of race-conscious affirmative action in public employment can be determined only on a case-by-case basis with a view to the particular facts presented. The present record is manifestly inadequate for such a determination. The writ of *certiorari* should be dismissed as occurred in *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981).

SUMMARY OF ARGUMENT

At issue is the constitutionality of a provision in the collective bargaining agreement between the Jackson Board of Education (hereafter "JBE" or "the Board") and the Jackson Education Association (hereafter "JEA"). Under the provision, minority representation among JBE's teachers is to be preserved in connection with layoffs.

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[1] Though disagreeing that it violated the Constitution by not unilaterally abrogating the inverse seniority provision, the City of Detroit nevertheless continues to contend that its proposed minority retention provision was lawful and constitutional as part of a remedy for past discrimination.

While this Court has not addressed the constitutionality of race-conscious affirmative action in public employment, a majority of the Justices have agreed that public entities may use race conscious measures where warranted in aid of a sufficiently compelling government interest and where such measures are appropriately-tailored to serve such an interest. Lower courts, based on these decisions, have uniformly held that use of race-conscious affirmative action measures in public employment is constitutional where appropriately-tailored to serve a sufficient governmental interest. Section I, *infra*.

A school board seeking to eliminate unconstitutional segregation of public schools and to root out the effects of such segregation presents the strongest case for use of race-conscious corrective measures. This Court has held that school boards owe an "affirmative obligation" to undo all of the effects of school segregation. It has repeatedly held not only that judicial decrees may appropriately take account of the race of public school students and teachers but also that state laws and court orders which purport to preclude the remedial consideration of race themselves deny equal protection. Not only are school boards *competent* to make determinations of the need to take race into account; *they are under a duty to do so.* Section II, *infra.*

The present case brought by white teachers against JBE was resolved in the trial court on cross motions for summary judgment. The record here is devoid of information reflecting JBE's justification for the race-conscious, minority retention provision. In fact, the records of prior, related cases suggest that JBE and the teachers union settled upon the challenged provision in the belief that such a provision was a necessary part of disestablishing a segregated school system. The constitutional issue here cannot appropriately be resolved based on the record of this case which is devoid of information regarding the historical justification for the challenged provision and the in-

tentions and objectives of the Jackson Board of Education in connection with establishing and maintaining that provision. On analysis, Petitioners' position in this Court relies on mere assertions regarding the purpose of the provision which are absolutely without foundation in the record and upon an extraordinary proffer of extra-record documents. While these documents are claimed to reflect pertinent labor market statistics, they cannot be accepted as dispositive when presented first at this level.

As was done in *Minnick*, *supra*, the writ of certiorari should be dismissed.

ARGUMENT

I. UNDER APPROPRIATE CIRCUMSTANCES RACE-CONSCIOUS AFFIRMATIVE ACTION WITHSTANDS CHALLENGE UNDER THE FOURTEENTH AMENDMENT AND TITLE VII.

This Court has previously held that, under appropriate circumstances, race-conscious affirmative action will withstand "strict scrutiny" under the Fourteenth Amendment, *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); and also survives challenge under Title VII, *United Steelworkers v. Weber*, 443 U.S. 193 (1979).[2]

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[2] The United States contends that the Sixth Circuit and the concurring opinion by Justice Brennan in *Bakke*, 438 U.S. at 324, have applied a test of "intermediate" or "permissive" scrutiny for race conscious affirmative action. Brief for the United States as Amicus Curiae, 10-24. To the contrary, no member of this Court nor the Sixth Circuit has taken the position that race-conscious affirmative action by governmental entities is to be tested under a standard more relaxed than "strict scrutiny". As stated by Justice Brennan in *Bakke*:

> our review under the Fourteenth Amendment should be strict—not '"strict" in theory and fatal in fact,' because it is stigma that causes fatality—but *strict and searching nonetheless.*
>
> 438 U.S. at 361-362 (Brennan, J. concurring in the judgment in part and dissenting in part).

This Court has not yet addressed the permissibility of race-conscious affirmative action in public employment.[3]

The City of Detroit has pursued race-conscious affirmative action in promotions to the ranks of police sergeant and lieutenant. Its program has withstood two separate challenges under the equal protection clause and federal rights laws, *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), on remand, 36 FEP Cases 1019 (E.D.Mich. 1984), appeal pending (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D.Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (sustaining race-conscious promotions to the rank of lieutenant). Both cases were resolved based on voluminous trial records containing comprehensive proofs by the City of Detroit of the circumstances which led the Detroit Board of Police Commissioners to adopt race-conscious measures. These circumstances included the Department's history of discrimination against black officers and citizens and the Department's need for increased minority representation at all levels of police employment in order effectively to police the City of Detroit. In these and other cases, the determination

[3] In *Weber*, the Court stated that this question was not posed, 443 U.S. at 200. The issue was posed in *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120 n. 28 (1981); however, *certiorari* was dismissed, among other things, because of ambiguities in the record concerning the extent to which race or sex had been used as a factor in making promotions and also the justification for such use, *id.* at 123-127; as set forth below, the record here is similarly inadequate.

In *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 2590 (1984), the Court stated it was not passing upon affirmative action programs which were adopted voluntarily by public employers.

of the appropriateness of race-conscious affirmative action has necessarily rested upon the "particular facts", *Bratton, supra*, 704 F.2d at 883. "What is or is not a 'reasonable' use of race will vary with the circumstances surrounding the need for, urgency and operation of a given plan." *Id.* at 887, n. 31.

Whether race-conscious affirmative action survives constitutional scrutiny in a given case thus requires a factual determination of the sufficiency of the governmental interest in implementing such a program and whether the particular program is properly tailored to the circumstances presented. The Sixth Circuit in *Bratton* explained the test as follows:

> A direct showing of past intentional discrimination is not required to establish the existence of this [governmental] interest . . . . It is sufficient if findings are made by a body with the competence to act in this area and a review of those findings reveals 'a sound basis for concluding that minority underrepresentation is substantial, and that the handicap of past discrimination is impeding access . . . of minorities.' . . .
>
> Once the governmental interest in some remedial action is thus established, we must proceed to determine whether the remedial measures employed are reasonable. This includes an examination of whether any discrete group or individual is stigmatized by the program and whether racial classifications have been reasonably used in light of the program's objectives. *Regents of the University of California v. Bakke*, 438 U.S. at 372-76, 98 S.Ct. at 2790-92; *Fullilove v. Klutznick*, 448 U.S. at 518-19, 100 S.Ct. at 2795. If the affirmative action plan satisfies these criteria, it does not violate the equal protection clause of the Fourteenth Amendment.

Bratton, supra, 704 F.2d at 886-87. See also *DPOA v. Young, supra*, 608 F.2d at 694.

The test, as explained in *Bratton*, is supported by the views previously expressed by a majority of the members of this Court in *Bakke* and *Fullilove*.[4] Thus, the permissibility of race-conscious affirmative action in appropriate circumstances is not seriously in dispute. The question is whether appropriate circumstances to justify such action exist in a particular case.

II. THE EQUAL PROTECTION CLAUSE UPHOLDS USE OF RACE-CONSCIOUS MEASURES BY SCHOOL BOARDS IN ORDER TO ELIMINATE PERCEIVED SCHOOL SEGREGATION AND ITS EFFECTS.

No stronger case can be made for the sustaining of race-conscious measures than where such measures are utilized by a school board—as appears to have been the case here, Section III, *infra*—as part of efforts to eliminate unconstitutional segregation of public schools.

In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the Supreme Court held the operation of racially-segregated school systems violative of the Fourteenth Amendment. The next year in *Brown v. Board of Education*, 349 U.S. 294 (1955) (Brown II), the Court held such dual systems *must be abolished*. The Court declared that school board operating such systems were *required* "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S. at 301.

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[4] Support for the use of this test based upon the views of at least five members of this Court in *Bakke*, is suggested by the Court's Opinion in *Minnick*, 452 U.S. at 115, n. 17. Indeed, it is notable, that only one member of the present Court, Justice Rehnquist, subscribed to the view expressed by Justice Stewart that race-conscious affirmative action could not withstand constitutional scrutiny in appropriate circumstances. (Justice Rehnquist, concurring in *Minnick*, 452 U.S. at 127, stated that but for his view that the lower court's judgment was not "final", he would have joined Justice Stewart's dissent, *id.* at 128.)

In *Green v. County School Bd.*, 391 U.S. 430, 437-438 (1967), the Court declared that a school board operating a dual system is

> clearly charged with the *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.
>
> (Emphasis added).

The affirmative duty extends to desegregation of faculty and staff as well as of students and requires affirmative hiring efforts where needed to accord black students the right to an integrated education. In *United States v. Montgomery Bd. of Ed.*, 395 U.S. 225 (1969), this court took up an issue of faculty and staff desegregation, a "goal" that it had previously "recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." 395 U.S. at 232, citing *Bradley v. School Board of City of Richmond*, 382 U.S. 103 (1965) and *Rogers v. Paul*, 382 U.S. 198 (1965). In that case, the Court upheld, as a reasonable step toward desegregation, a district court order requiring that at each school there be placed a minimum number of teachers whose race was different from that of the majority of students at the school.

In *Swann v. Charlotte Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971), the Court stressed again the responsibility of school authorities to eliminate segregation. It explained that the broad equity powers of federal courts arise in "default by the school authorities of *their obligation* to proffer acceptable remedies . . . ." *Id.* at 16 (emphasis added). The Court in *Swann* held not only that race may be taken into account by a federal court in devising a suitable remedy for segregation but is also properly considered by school boards *even apart from* discharging their affirmative obligations to abolish unconstitutional desegregation. Chief Justice Burger stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.*
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> (Emphasis added).

In a companion case, *North Carolina State Bd. of Ed. v. Swann*, 402 U.S. 43 (1971), the Court considered a state law forbidding student assignments which take account of race. The Chief Justice stated:

> the flat prohibition against assignment of students for purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . . An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit commands of *Green v. County School Board* . . . that all *reasonable methods be available to formulate an effective remedy.*
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> 402 U.S. at 46 (emphasis added).

In another compansion case, *McDaniel v. Barresi*, 402 U.S. 39 (1971), the Court reviewed a state court order enjoining the operation of a voluntary program to desegregate public schools involving race-conscious student assignments. The Chief Justice stated as follows:

> The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines. To have done otherwise would have severely hampered the board's ability to deal effectively with the task at hand. School boards that operated dual

> school systems are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' . . . . In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' . . . Any other approach would freeze the status quo that is the very target of all desegregation processes.
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> 402 U.S. at 41.

In *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 200 n. 11 (1973), the court reaffirmed that the "affirmative duty" declared in *Green* "to take whatever steps might be necessary" "remains the governing principle". The Court specifically rejected the notion urged by Justice Rehnquist's lone dissent that the "affirmative duty to integrate of *Brown II*" was only a "'prohibition against discrimination' 'in the sense that the assignment of a child to a particular school is not made to depend on his race. . . .'" In *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979), the Court declared that "[e]ach instance of a failure or refusal to fulfill [the] affirmative duty (declared in *Green*] continues the violation of the Fourteenth Amendment." 443 U.S. at 459.

Thus, it is clear that the Fourteenth Amendment *not only allows but requires* school boards operating unconstitutionally segregated systems to take all reasonable steps to bring about an integrated system. Such cases as *North Carolina v. Swann* and *McDaniel v. Barresi* make plain that equal protection is denied, not by a school board's initiation of race-conscious, corrective action, but *inter alia* by state laws and court orders which purport to stand in the way of appropriate consideration of race.

Where a school board's operation of an unconstitutionally segregated system has included a history of discrimination in teacher hiring, provision for retention of

minority teachers in the event of layoffs is appropriate race-conscious relief and has been upheld where imposed by judicial decree, *Morgan v. O'Bryant*, 671 F.2d 23, 27-28 (1st Cir. 1982); *Arthur v. Nyquist*, 712 F.2d 816, 822-24 (2nd Cir. 1983), *cert. denied, sub. nom. Buffalo Teachers v. Arthur*, —— U.S. ——, 104 S.Ct. 3555. In *Morgan*, based on findings of unconstitutional school desegregation including discrimination in faculty hiring, the District Court ordered the Boston public schools to engage in affirmative hiring of black faculty on a one-for-one basis. When increasing representation of black faculty was threatened by a budget crisis, the District Court, overriding inverse seniority, required the layoffs be conducted so as to maintain the existing percentage of black teachers. The First Circuit in *Morgan* upheld the minority retention decree as a proper equitable remedy for the black school children who had been victims of unconstitutional discrimination. The First Circuit stated:

> It has been recognized from the beginning that the victims here are the black school children, not the possible hiring discriminatees. . . . The orders are thus designed insofar as possible, to make the school children whole. Proof of individual hiring discrimination is irrelevant. The employment cases cited by appellants are inapposite to this issue.
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> 671 F.2d at 27.

Similarly, in *Arthur* the Second Circuit sustained a minority retention decree declaring the District Court ". . . had the authority to curtail the seniority rights of the Federation's membership in order to vindicate the constitutional rights of the minority children in the Buffalo school system." 712 F.2d at 822, n.5.[5]

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[5] At the same time, the Second Circuit was cognizant of the interests of majority teachers. In one respect, it found the District Court's Order "needlessly harsh" and directed that "majority" excessed teachers be placed on preferred eligibility lists so as to be given first chance according to their seniority for such temporary or permanent positions as become available, 712 F.2d at 823.

The justification for the minority retention decrees approved in *Morgan* and *Arthur* is firmly rooted in *Brown I* and decisions of this Court holding a desegregated faculty to be an essential ingredient of a desegregated system. If courts could decree the overriding of *bona fide* seniority provisions in order to preserve minority teacher representation, *a fortiori* a school board's compliance with its affirmative obligation to eradicate segregation may include *agreement* with the teachers' collective bargaining representative for an analogous measure.

School boards are undoubtedly competent to make determinations regarding the need for race-conscious measures to eliminate school segregation. The posture of a school board taking steps to eliminate unconstitutional segregation is totally different from that of the California Board of Regents as described by Justice Powell in *Bakke*, see 438 U.S. at 309. In attempting to equate the two, the United States cites *Brown I* (Brief of United States as *amicus curiae*, 4, 32) but ignores the litany of this Court's ensuing school desegregation decisions which have made corrective action, including race-conscious corrective action, a matter of constitutional duty. Quite clearly, this Court did not intend to impose an affirmative obligation which school boards are not competent to perform. Notably, the Sixth Circuit in *Bratton v. City of Detroit*, 704 F.2d at 888, n.33, decisively rejected a parallel attack on the competence of the Detroit Board of Police Commissioners to determine the need for race-conscious promotion measures.

As set forth below, the record of this case, though sparse, is suggestive that the Jackson Board of Education bargained for the minority retention provision at issue as part of a comprehensive program to eliminate what it colorably perceived as an unconstitutionally segregated school system.

III. THE PRESENT RECORD IS NOT ADEQUATE TO PASS UPON THE JUSTIFICATION FOR THE CHALLENGED MEASURE.

Resolution of the constitutional issue posed in this case is hampered by the fact that, in the District Court, both parties to this litigation thought the issue could be resolved through summary judgment without a factual record regarding the circumstances which engendered the measure challenged. As detailed below, JBE's summary judgment brief described the challenged provision's inception as part of efforts by JBE to eliminate segregation of the Jackson schools.[6] Rather than countering the recitations in JBE's brief, Petitioners *agreed they had no dispute on the facts.* Given the peculiar manner in which Petitioners agreed the case could be resolved, the District Court properly entered judgment for JBE and the Sixth Circuit properly affirmed.

Tellingly, Petitioners—Plaintiffs below—now not only acknowledge but proclaim the inadequacy of the record in this matter. Along with their Brief on the merits (which, itself includes several tables setting forth extra-record facts and statistics), they have filed an extraordi-

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[6] The transcript of the summary judgment argument before District Judge Joiner of February 23, 1982 (not reproduced in the Joint Appendix) reflects the parties' recitations that they had "no dispute on the facts . . . ." (Tr. February 23, 1982, 6).

The record contains summary judgment motions filed respectively by the Plaintiffs and JBE both of which are largely unsupported by factual proffer. The record contains a total of three affidavits, none of which addresses the justification, or lack thereof, for the challenged provision: (1) Affidavit of Plaintiff Susan Diebold re Minority Teachers Seniority with teacher seniority list as of March 1, 1981 (J.A. 54-100); (2) Affidavit of Plaintiff's counsel Thomas Rasmussen re Interpretation re Seniority List (J.A. 101); (3) Affidavit of JBE personnel operations coordinator Jane I. Phelps (not included in Joint Appendix). The Phelps Affidavit includes some historical information regarding minority faculty hiring and representation and regarding representation of blacks in the school population.

nary submission entitled "Petitioners' Lodging" setting forth 21 separate items of assertedly pertinent evidence, none of which was even alluded to by them in the District Court or the Court of Appeals.[7] Petitioners' documentary proffer amounts to a request that this Court conduct an original trial proceeding based on voluminous evidence whose absence was specifically noted in the lower court. The Petition for Writ of Certiorari, which this Court granted, surely contained no hint that Petitioners would present voluminous extra-record material and effectively ask this Court to conduct an original proceeding in order to reach the constitutional issue which Petitioners posed.

Although not included in the record here, several items of evidence in two related cases involving the provision at issue do support the recitations in JBE's summary judgment brief.[8] That evidence suggests circumstances

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[7] Notably, Judge Wellford in concurrence below stated that had Plaintiffs presented data as to the percentage of qualified minority teachers in the relevant labor market to show that the Board's hiring of black teachers over a number of years had equalled that figure, he believed the Court of Appeals might well have been required to reverse the District Court's judgment. 746 F.2d at 1160.

[8] Decisions by federal District Judge Robert E. DeMascio in *Jackson Education Association v. Board of Education* (E.D. Mich. 1977) (*Jackson I*), and by Jackson County Circuit Judge Gordon W. Britten in *Jackson Education Association v. Board of Education* (Jackson County Circuit Court, 1979) (*Jackson II*), are included in the Joint Appendix (J.A. 30, *et seq.* and 39, *et seq.*). Notably, the two cases were brought by the Jackson Education Association and black teachers when JBE refused to follow the minority retention provision in making layoffs in 1974 and instead laid off according to inverse seniority (J.A. 43).

Judge DeMascio's Opinion refers to a deposition by a former school official, Dr. Lawrence Read, who was Superintendent of Schools when the challenged provision originated; to trial testimony by the Executive Director of the Jackson Education Association, Kirk Curtis; and to 15 exhibits which were admitted into evidence along with the Read deposition testimony (J.A. 34). While this

analogous in numerous respects to those proven in the Detroit litigation in which the Detroit Police Department's race-conscious promotion program was sustained.

JBE's summary judgment brief recites that the challenged minority retention provision originated as part of actions by the Jackson Board of Education to desegregate Jackson's public schools in 1972.[9] The brief recites that Jackson's public schools were historically segregated. With support from the Affidavit of Jane I. Phelps, the brief recites that between 1950 and 1953, the Jackson schools engaged in extensive teacher hiring—*189 new teachers were hired in those years, all of whom were white.* In 1953-54, when an additional 61 teachers were hired, the Jackson school system hired its *first* black teacher. Hiring of black teachers proceeded slowly through the balance of the 1950's and the bulk of the 1960's. As of 1969 when black students made up 15.2% of the total student population, black representation on the faculty was only 3.9%. JBE summary judgment brief, 1; Affidavit of Jane Phelps.

JBE's summary judgment brief further recites, albeit without record support, that Jackson's high schools had been desegregated in 1962; that its junior high schools had been desegregated in 1969; but that its elementary schools remained segregated through 1972, the year when

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and other evidence would have a vital bearing on the permissibility of the challenged provision under the equal protection clause, none of it is included in the record of this case.

We understand Respondent will submit certified copies of the records in the two *Jackson Education Association* cases to this Court and references thereto are made in this Brief to support our contentions that the record is not adequate for resolution of the important constitutional issue which is posed.

[9] Petitioners' repeated assertions that this is not a case involving school desegregation (Petitioners Br. 11, 34) are not supported by the limited record here and appear contrary to the actual facts.

the minority retention provision was adopted.[10] JBE's summary judgment brief states that complaints regarding the continued segregation of the elementary schools and asserted discrimination by the Board in staff hiring and placement were filed with the Michigan Civil Rights Commission by the Jackson NAACP and recites that "efforts to integrate the elementary schools and to set up increased minority hiring were prompted, in part, by these complaints" (JBE Summary Judgment Brief, 1).[11]

JBE's summary judgment brief refers to the formation of various committees to study the problems of school segregation including the shortage of black teachers in Jackson. It refers to reports and recommendations made at various times between 1969 and 1972 by these committees and also by the school system's minority affairs office. For example, the JBE summary judgment brief recites that the Citizens Schools Advisory Committee "studied all aspects of integration including teacher hiring and training", JBE summary judgment Brief, 2.[12]

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[10] The Read Deposition, which was received in evidence by Judge DeMascio, includes testimony regarding desegregation of the high schools in 1962 and junior high schools in 1969 (Read Dep., 6-7). The continuing racial isolation of black elementary school students and teachers—what few there were—is reflected in the various exhibits received by Judge DeMascio as detailed below.

[11] We are apprised that these complaints and ensuing investigatory reports and other documentation are matters of record with the Michigan Commission. They were not included in the record here nor in the record of the two prior related proceedings. Clearly, however, they would provide pertinent evidence regarding the information before the Jackson Board of Education when it bargained for the challenged provision.

[12] Some, though by no means all, of the pertinent reports are among the trial exhibits received by Judge DeMascio (J.A. 34). For example, the October 9, 1969 report of the Professional Staff Ad Hoc Committee, referred to at p. 1 of JBE's summary judgment brief, was received in evidence as Exhibit 1 in the trial before Judge DeMascio. A report by the racial subcommittee of the Citizens Schools' Advisory Committee of May 11, 1970, apparently re-

JBE's summary judgment brief recites that the inverse seniority provision in the collective bargaining agreement up to 1972 was a hindrance to successful recruitment of minority teachers. Testimony regarding these matters appeared in the deposition of Dr. Read, 24, and in the trial testimony of JEA Executive Director Curtis (*Jackson I* Tr. 16-20). This testimony reflects agreement between the school superintendent and the union leader that the minority retention provision was necessary for successful recruitment of qualified minority teachers so as to cure the Jackson schools' chronic shortage of minority teachers. They testified that economic circumstances and decreasing student enrollment made layoffs likely and discouraged qualified black teachers from accepting employment in Jackson. JEA executive Director Curtis testified that the minority retention provision was "certainly" "necessary to correct the past problems" of segregation in the Jackson system and that "if we didn't do some modifications in the seniority system, we certainly weren't going to achieve the goals we were talking about before." (*Jackson I* Tr. 41-43). Dr. Read's testimony was to the same effect (Read Dep. 65-69).

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ferred to at p. 2 of JBE's summary judgment brief, was received as Exhibit 2. Recommendations of the school system's Minority Affairs Office of November 18, 1971 also referred to at p. 2 of JBE summary judgment brief, were received as Exhibit 4. The January 27, 1972 questionnaire disseminated by the Minority Affairs Office to all teachers in the system referred to at p. 3 of JBE's summary brief was received as Exhibit 6.

Notably, pertinent testimony explaining the circumstances which led some 96% of the teachers to express preference, in their questionnaire answers, for straight seniority was the subject of testimony by JEA's Executive Director. This testimony appears in the transcript of the trial before Judge DeMascio, *Jackson I* Tr. 25. As noted above, that trial transcript is not part of the record here.

The recommendation by the Citizens Advisory Committee of February 17, 1972 that all elementary schools be desegregated as of the fall of 1972 and that the Board attempt to balance faculty representation was received as Exhibit 8.

Dr. Read perceived that the shortage of minority teachers was the result of past discrimination in teacher hiring. His perception, though not fully explored, was made clear in the deposition. For example, Read testified that he had been told that the Jackson schools had previously had a policy of not hiring blacks; specifically he stated that "an administrator in the Flint Public Schools . . . told me she had tried to get a position in Jackson in the early 1950's and was told that they didn't hire colored people." Read affirmed that this was the "type of thing" that he and the school system's minority affairs office were addressing in approaching the problem of desegregation (Read Dep., 22-23).

JBE's summary judgment brief refers to an occurrence in 1972 described as "a violent 'racially motivated explosion at Jackson High School probably the worst we have had', which featured fighting and rioting among the students." JBE summary judgment brief, 4. In fact, the quotation is from the Read Deposition which includes additional information regarding the February 1972 incident (Read Dep. 36-37). The trial testimony of JEA Executive Director Curtis included testimony regarding the February 1972 disturbance and also other incidents involving racial violence in the Jackson schools, *Jackson I* Tr. 31-32.

The body of evidence before Judge DeMascio—which by no means constitutes all of the evidence pertinent to the justification for the minority retention provision and JBE's objectives and intentions in bargaining for it—strongly suggests that the Board's actions in 1972 including bargaining for the challenged minority retention provision were based on a well-founded view that steps fully to desegregate Jackson students and faculty were constitutionally and morally required.[13] Dr. Read, who presided

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[13] Factual development was truncated by Judge DeMascio's instruction that the examination could be "shorten[ed] . . . if it is indicated that there is no evidence going to be offered to oppose the fact that the Board of Education of Jackson had been involved

over Jackson's desegregation efforts as Superintendent of Schools, testified that he had been told by the president of the Jackson NAACP that he had a federal court complaint ready to file should desegregation be postponed or abandoned (Read. Dep., 44). Read testified that other cities in Michigan with black students had already been sued including Kalamazoo, Grand Rapids, Pontiac and Benton Harbor and that these school systems had been placed in a state of turmoil by the desegregation suits (Read Dep., 43). He testified that the Jackson black community was "100% supportive of the desegregation effort" and that they "wanted action" and were suspicious of "vacillation" on the issue (Read Dep., 43).

Most enlightening is a question-and-answer brochure circulated by JBE in the spring of 1972 to explain the reasons for the Board's decision to desegregate the elementary schools effective in the fall of 1972.[14] The brochure included questions such as:

> Why do we have to desegregate our elementary schools?
>
> What about the difference between (de jure) segregation and accidental (de facto) segregation in the schools? Didn't the original Supreme Court decision in 1954 only apply to legal (de jure) segregation?
>
> Why not wait for a court to order the Jackson school district to segregate?

In answer to this last question, the brochure stated as follows:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated

in the ongoing problem of a segregated system and that they were taking steps to attempt a desegregated system." (Jackson I Tr. 33-34). JBE presented no evidence contrary to that proposition in the prior case just as it presented no evidence in support of it here.

[14] The brochure was received in evidence by Judge DeMascio as Exhibit 8.

> school system. Firmly established legal precedents mandate a change. Many citizens know this to be true.
>
> Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law. . . .[15]

Further, the school system's few black teachers were heavily concentrated in the predominantly black schools. While this fact was not clearly indicated in the trial record before Judge DeMascio, published surveys of the Office of Civil Rights of the U.S. Department of Health, Education, and Welfare indicate that as of the fall of 1970, fourteen of Jackson's 22 elementary schools had *no* black teachers. Of Jackson's 15 elementary school teachers at the time, 4 were at heavily-black Helmer and another 4 were at heavily-black McCulloch. Dr. Read testified that just prior to desegregation, there were some schools with five or six black teachers and others with none (Read Dep., 49).

For whatever reason, black students' interest in continued application of the minority retention provision has not been vigorously defended by JBE. The record before Judge DeMascio suggests possible reasons for this. It re-

[15] Further, the brochure recited that many students were already being bused out of their own neighborhoods to seven listed schools which were predominantly white; at the same time the brochure stated that students living close to two heavily-black schools had for years been bused to schools in other neighborhoods (Exhibit 8, answer to question 6).

The racial composition of the nine schools in question is reflected as of 1969-70 on a sheet marked "Exhibit 1" which is part of the May 14, 1970 Report of the Citizens of the Advisory Committee (received as Exhibit 2 by Judge DeMascio). The two heavily-black schools, Helmer and McCulloch, had black representations of 60% and 86% respectively. The seven predominantly white schools had black representations as follows: Ridgeway—0%; Harrington—0%; Sharp Park—5%; Lincoln—24%; Dibble—7%; Blair—5%; and Trumbull—.5%.

flects that the issue of school desegregation had bitterly divided the Jackson community (Read. Dep. 40); that three school board members who supported the desegregation effort were defeated in an election in June 1972 (Jackson I Tr. 44); and that Dr. Read himself was fired as School Superintendent in the fall of 1972 (*id.*) In his deposition, Dr. Read stated that while he had carried out the policies of the preceding Board in spear-heading desegregation, he was terminated because the new Board was philosophically not in sympathy with those efforts (Read Dep., 59-62). Notably, when layoffs became necessary in 1974, the Board declined to follow the minority retention provision (J.A. 43). That action resulted in the prior litigation in which the minority retention provision was upheld and JBE was required to comply with it. Ensuing compliance by JBE triggered the present litigation by individual white teachers in which JBE has failed to produce as evidence any of the matters considered by it in bargaining for the minority retention provision.

Quite plainly, the black public school students who were the victims of Jackson's apparent school segregation have an interest in the defense of the challenged minority retention measure, *Rogers v. Paul, supra*, 382 U.S. at 200 (upholding standing of minority students to challenge school board's alleged policy of racial allocation of teachers). That interest has been less than adequately protected by JBE which in the prior litigation sought to defend its violation of the provision and which has failed to include in this record even the limited evidence supporting the measure which was adduced by the teachers union in the prior case.

The critical constitutional issue which is posed here has far-reaching implications, not only for black students and parents in Jackson but for minority citizens throughout the United States and for governmental entities such as the City of Detroit with longstanding commitments to defense of affirmative action principles. The

constitutional issue posed here should not be adjudicated without a record which reflects the circumstances which in fact engendered the race-conscious measure at issue. In *Bradley v. School Bd. of City of Richmond, supra*, the Court held that parents and students were entitled to full evidentiary hearings on their contentions that faculty allocation on an alleged racial basis was inadequate to bring about a fully desegregated system. The Court held that the lower courts had erred in approving a desegregation plan without allowing such a hearing. Likewise, this Court should not pass upon the constitutional issue posed here without a record reflecting JBE's justification for adoption of the challenged measure.

In this case, the inadequacy of the record militates in favor of dismissal of certiorari just as occurred in *Minnick*. Petitioners bore the burden of producing evidence in the trial court that the challenged provision is not warranted as a remedy for segregation and discrimination as perceived by JBE and JEA. That burden cannot be satisfied by evidence proffered for the first time here. Instead of countering JBE's recitations in the trial court, the petitioners indicated there was no factual dispute. Given the peculiar manner in which petitioners agreed the case could be resolved, the District Court reached the correct result. That same peculiarity, which caused the case to come here without pertinent record materials, makes it an unsuitable vehicle for constitutional adjudication. Certiorari should be dismissed.[16] The constitutional issue posed should await a case presenting an adequate record for its resolution.

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[16] While this case could be remanded for further proceedings, we believe dismissal of certiorari to be the better course. Petitioners have had their day in Court below. Disposition of the case without evidentiary development resulted from their failure to dispute JBE's factual recitations and their representation that the facts were not in dispute. They have no valid claim for a second opportunity to raise factual disputes and present evidence.

CONCLUSION

For the reasons stated, certiorari should be dismissed.

Respectfully submitted,

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No. 84-1340 (12)

In The
Supreme Court of the United States
October Term, 1985

WENDY WYGANT; SUSAN LAMSON; JOHN KRENKEL; KAREN SMITH; SUSAN DIEBOLD; DEBORAH BREZEZINSKI; CHERYL ZASKI; and MARY ODELL,

v. Petitioners,

JACKSON BOARD OF EDUCATION, JACKSON, MICHIGAN; RICHARD SUNBROOK, President; DON PENSON; ROBERT MOLES; MELVIN HARRIS; CECILIA FIERY; SADIE BARHAM; and ROBERT F. COLE, Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION, MICHIGAN DEPARTMENT OF CIVIL RIGHTS

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No. 84-1340

In The
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October Term, 1985

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v.

JACKSON BOARD OF EDUCATION, JACKSON, MICHIGAN; RICHARD SUNBROOK, President; DON PENSON; ROBERT MOLES; MELVIN HARRIS; CECILIA FIERY; SADIE BARHAM; and ROBERT F. COLE,
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BRIEF OF AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION, MICHIGAN DEPARTMENT OF CIVIL RIGHTS

INTEREST OF AMICUS

On behalf of the Michigan Civil Rights Commission and the Michigan Department of Civil Rights, the Michigan Attorney General respectfully offers this brief amicus curiae for Supreme Court consideration in accordance with Supreme Court Rule No. 36. The Attorney General's position in this brief amicus curiae is aligned with Respondent's interests proposed in this case.

These state agencies advance a unique perspective by emphasizing the obligation of a public employer to participate

in affirmative action plans, and by tracing the state of Michigan's longstanding commitment to equal employment opportunity. Additionally, these agencies seek to convey the practical and theoretical importance of upholding the opinion of the Sixth Circuit Court of Appeals in view of the direct impact that decision has on the state of Michigan's public employment contracts and other affirmative action efforts.

OPINION BELOW

The United States District Court opinion is reported at 546 F. Supp. 1195 (E.D. Mich. 1982) and the United States Sixth Circuit Court of Appeals decision is found at 746 F.2d 1152 (6th Cir. 1984).

STATEMENT OF THE CASE

This case presents the issue whether public employers can constitutionally enforce affirmative action exceptions to strict seniority-based layoffs that have been collectively bargained for and approved by union employees. This case also challenges the validity of affirmative action programs designed to maintain minority participation in the face of predictable reductions in the number of minority employees.

The provisions at issue appear in the negotiated employment contracts between the Board of Education of the City of Jackson, Michigan, and the Jackson Education Association. In accordance with a 1968 settlement of an education desegregation complaint filed with the Michigan Civil Rights Commission, the Jackson Board of Education agreed to remedy minority underrepresentation by instituting affirmative action policies in the recruitment, hire and promotion of its faculty. The out-of-line seniority layoff provisions were introduced to

comply with the Commission's order by prohibiting a greater percentage of minority personnel from layoff than the percentage of minorities currently employed. *Wygant*, 746 F.2d at 1158.

The courts below recognized the validity of the Jackson Board of Education's conclusion that substantial underrepresentation of minority faculty plagued their teaching staff and impeded their school desegregation program. *Wygant*, 746 F.2d at 1156. The courts below dismissed Petitioner's challenges. *Id.* at 1161.

SUMMARY OF THE ARGUMENT

The final resolution of the issues raised in *Wygant*, 746 F.2d at 1152, is certain to bring into question the validity of public employment contracts containing race-conscious layoff provisions and of other affirmative action efforts by the state of Michigan.

The position *amici* advocate in this brief is based on the state of Michigan's demonstrated commitment to equal employment opportunity. The need for and development of the State's affirmative action policies illuminate the State's responsibility as a public employer to eliminate discrimination against minorities. Employment contract terms providing for affirmative action exceptions to strict seniority based layoffs are necessary to make equal employment opportunity a reality in Michigan.

There are certain parallels between the state of Michigan's response to equal employment needs and the Jackson School Board's decision to voluntarily institute affirmative action policies. Both of these employers utilize a last-in; first-out seniority system. Both have engaged in voluntary efforts to

achieve equal employment opportunity through collectively bargained agreements permitting out-of-line seniority layoffs.

The Michigan Civil Rights Commission and Michigan Department of Civil Rights believe that the State's affirmative action policies are a positive manifestation of Michigan's obligations to advance the goals of equal employment opportunity. Thus, it is imperative that the Sixth Circuit Court of Appeals' decision in *Wygant* be upheld so that the state of Michigan can continue its efforts to promote minority participation at all levels of public employment in compliance with applicable statutory and constitutional law.

ARGUMENT

INTRODUCTION

The purpose of this amicus brief is to demonstrate the state of Michigan's interest in the continued validity of out-of-line seniority layoffs. Such provisions have been included in the state's collective bargaining agreements so that when a layoff would have caused a disparate impact, an underutilization, or an increase in an existing underutilization of a protected class, minority participation is conditionally preserved. These contract terms along with other affirmative action efforts have been effective in maintaining increased minority paprticipation in state employment. It is essential that affirmative action exceptions to strict seniority layoffs remain available options to management and labor when a reduction in force will predictably have a disparate impact.

During times of economic prosperity, employers have the opportunity to recruit, hire and promote minorities through affirmative action programs. By and large, such opportunities have significantly increased minority involvement in state

classified service. However, in times of economic downturn, the advancements made toward equal employment opportunity are particularly vulnerable to the impact of a reduction in force where the seniority system requires last-in, first-out layoffs.

I. THE STATE OF MICHIGAN'S EFFORTS TO ACHIEVE EQUAL OPPORTUNITY

The state of Michigan has historically been in the forefront of legislative and judicial policy guaranteeing its citizens equality of opportunity. As early as 1835, the Michigan Constitution emphasized the concept of equality, stating that "no man or set of men are entitled to exclusive or separate privileges." *Michigan Const. of 1835, art. 1,* § 3.

Racial segregation in public education was prohibited in 1867 by the Michigan legislature. *1867 Mich. Pub. Acts 34.* In 1869, a statute was enacted which forbade licensed life insurance companies from considering race in the issuance of insurance policies. *1869 Mich. Pub. Acts 77.* Racial discrimination in public places of accommodation, amusement and recreation became a criminal offense in 1885. Also in that year, race discrimination in jury selection and qualification was prohibited. *1885 Mich. Pub. Acts 130.*

The 1908 Michigan Constitution augmented equal employment opportunity by providing that ". . .no removals from racial or religious considerations. "*Mich. Const. of 1908, art 6,* § 22. The Michigan Constitution of 1963 presently in effect further advances civil rights guarantees, art. 1 § 2, and creates a constitutional Civil Rights Commission, *art. 5,* § 29. It is the only state civil rights agency with a foundation.

Even before the creation of the Civil Rights Commission as a a constitutional body, the state of Michigan established the Fair Employment Practices Commission, *Mich. Comp. Laws 423.301 et seq. (1948)* (repealed 1976). This Commission was authorized to enforce employment discrimination prohibitions against both private and governmental employees. The Elliott-Larsen Civil Rights Act, which replaced the 1955 legislation continued these prohibitions against employment discrimination. *Mich. Comp. Laws §§ 37.2201, 37.2202 (1976).*

Michigan courts, like the Michigan legislature, have demonstrated sensitivity to civil rights issues. For example, in *Bolden v. Grand Rapids Operating Corp,* 239 Mich. 318, 214 N.W. 241 (1927), the state Supreme Court held that the Act prohibiting race discrimination in places of public accommodation was a constitutional exercise of the police power.

Additionally, a statute barring lower wages for women than for men similarly employed was declared constitutional by the Michigan Supreme Court, *General Motors Corp. v. Read,* 294 Mich. 558, 293 N.W. 751 (1940).

Recent Michigan decisions considering the validity of affirmative action plans have been supportive. For example, employees of the Michigan Department of Corrections challenged the state's use of affirmative action procedures for transfer and promotion which gave special consideration to candidates on the basis of race or sex. The Michigan Court of Appeals held that race and sex "may be factors used by an employer when the plan is designed in an effort to correct prior discriminatory practices and a present selection method may not be free from discriminatory efforts." *Local 526-M, Michigan Corrections Org. v. Civil Service Comm'n,* 101 Mich. App. 546, 555, 313 N.W.2d 143, 148 (1981).

The Sixth Circuit Court of Appeals found, after consideration of a race-conscious promotion plan employed by the Detroit Police Department, that substantial underrepresentation of minorities in the department justified the use of distinctions based on race. *Detroit Police Officers Ass'n v. Young,* 446 F. Supp. 979 (E.D. Mich. 1978), *rev'd.* 608 F.2d 671 (6th. Cir. 1979), *cert. denied,* 452 U.S. 938 (1981); *Baker v. City of Detroit,* 504 F. Supp. 841 (E.D. Mich. 1980), *app. sub. nom., Bratton v. City of Detroit,* 704 F.2d 878 (6th. Cir. 1983), *cert. denied,* 104 S. Ct. 703 (1984).

The Sixth Circuit's endorsement of affirmative action plans voluntarily instituted by employers is based on the reasonableness of the plan determined by certain factors: whether the plan is substantially related to the objective desired; whether alternatives are available; whether it results in the imposition of a constitutionally forbidden stigma on those disadvantaged by it; and whether those individuals adversely affected by the plan have interests that have been unnecessarily thwarted. *Young,* 608 F.2d at 694, 696; *Bratton,* 704 F.2d at 889-892. These standards were used to evaluate the affirmative action plan in the courts below in *Wygant,* and since the plan withstood scrutiny, it was held valid.

While there is no question that judicial decisions have favorably advanced the state's equal employment objectives, executive action is essential to the creation and enforcement of affirmative action policies. Through the initiative of the Governor's office, the state of Michigan has made great strides toward achieving equal employment opportunity in all of the departments of state government. Various strategies have been adopted by the state. In 1972, a Civil Service rule change was authorized to broaden lists of eligible applicants so that qualified racial and ethnic minorities and women who had passed the civil service examination but were not among the top three candidates could be included in the competition for

appointment.[1] In 1973, the selection rule which had previously limited choice to the top three candidates was changed to a band width of closely related scores to provide a wider range of choice and include qualified minorities and women in the selection pool. At the same time, a policy was adopted which provided additional examination opportunities in classifications where minorities and women were underrepresented and whch encouraged additional recruiting efforts where minorities and women were not represented on the eligibility rosters. Studies of selection procedures and their effects have been implemented to asssess possible disparate impact.

These endeavors to achieve equal employment opportunity arose out of the findings of a 1971 joint study conducted by the Michigan Civil Rights Commission and Michigan Civil Service Commission at the request of then Governor Milliken, which exposed pervasive underrepresentation of minorities in state departments. "White males were represented in over 90% of all classes in state service and exclusively occupied nearly 60% of all classes. Of these classes which contained only white males, some 850 were at the 11 level or above." *Mich. Civil*

[1]

The "Rule of Three" selection procedure, authorized by the Civil Service Commission, required that, for each vacant position, the Civil Service Commission certify to the employing agency the top three names on the eligible roster; the employing agency was required to make its selection from among those three names only. *Mich. Civil Service Comm'n Rules art. 26 B-3 (1955).* The band width selection procedure replaces the 'Rule of Three' and requires that for each vacant position, the Civil Service Commission will certify to the employing agency the list of those persons who have scored, for example, between 96 and 100 on an examination, and when that listing is exhausted, the Commission will then certify the names of persons scoring between 91 and 95. *Mich. Civil Service Comm'n Rules, 3-4.4 (1983).*

In all instances, those persons certified have been examined and are deemed qualified, and the Civil Service Commission retains its standards of merit, efficiency and fitness.

Rights Comm'n, Review of Mich. State Classified Service at 2 (1971).

The first Executive Directive was issued in 1971 to address this substantial racial underrepresentation. Under this Directive (1971-8), the Department of Civil Service was charged with implementing recommendations to attain the goal of reasonable representation in all state classified employment. An affirmative action plan for each department was then ordered by Civil Service. Subsequently, four additional Executive Directives and Orders have reaffirmed Michigan's commitment to non-discrimination in state employment. In Executive Directive 1975-3, the Michigan Equal Employment Opportunity Council (MEEOC) was created to oversee the state's equal opportunity program and to evaluate the affirmative action plans of each department.[2] Progress toward eliminating discrimination in the state classified civil service is evidenced by the increasing representation of minorities: In 1971, 17 of the 21 departments in state government had significant underrepresentation of minorities; by 1979, 11 of these 21 departments met or nearly met the minority representation reflected in the state's population.

Despite this progress, the next Executive Directive identifies ". . .areas in which more must be done if we are to achieve our goal of providing a state personnel system which is truly open to all people. These . . .directives are . . .intended to stimulate additional actions." *Exec. Dir. 1979-2.* The 1979 Directive focuses on requiring pre-appointment review of all upper level positions to encourage minority involvement in all ranks of state employment.

[2]

One Department, the Michigan State Police, has been under a federal Court order relative to minority hiring since 1977, *United States v. Michigan,* No. G 75-472-CA 5 (W.D. Mich. Sept. 29, 1977).

Since it was apparent in 1979 that layoffs were imminent due to budgetary reductions, the MEEOC liasion staff prepared a report on the potential impact of personnel reductions on minorities. *Mich. Equal Employment Opportunity Council, 1980 Report.* As a result of this report, MEEOC's guidelines for departmental affirmative action plans were updated to include layoff protection for minority group members. With union approval, out-of-line seniority layoff provisions were adopted in the 1980 state employment contracts. The Civil Service Commission also acted to reduce the projected disparate impact of layoffs by amending Section 1 of its rules to include an affirmative action exception to seniority layoffs. *Rules of the Mich. Civil Service Comm'n, § 2-19.3d (1983).*

The state has continued its efforts to achieve equal employment opportunity for all. Executive Order 1983-4 established the Michigan Equal Employment and Business Opportunity Council (MEEBOC) with the Lieutenant Governor as chair. The Council was ordered to issue guidelines for the development of affirmative action programs for each state department, agency and Commission.[3] Executive Order

[3]

One recent example illustrates the state's commitment to equal employment opportunity and the difficulties in achieving a more representative work force. In 1984, the Legislature enacted a onetime only, voluntary, early retirement scheme. *Mich. Comp. Laws §§ 18.1411, 38.19(a) (1984).* These statutes provided for voluntary, early retirement incentives for persons who had a certain length of service combined with age requirements, and also specified that state departments could only fill 25% of the vacancies created by such retirements. All vacancies where replacements were authorized were required to be filled ". . .in accordance with affirmative action goals and objectives reflected in MEEBOC approved affirmative action guidelines." *Mich. Comp. Laws § 18.1411(6) (1984)* MEEBOC was directed to review all proposed replacements to assure that statutory requirements were met.

Initially, MEEBOC planned to review only the replacements, but because many of the vacated positions were at higher levels and replacements were made by promotion, a chain of promotions and hires resulted,

1985-2 continued the authority of MEEBOC and the Lieutenant Governor. It further required review by both the Civil Rights Commission and the Civil Service Commission of a state overall affirmative action plan.

II. MICHIGAN'S OBLIGATIONS TO PROMOTE AFFIRMATIVE ACTION IN THE STATE CLASSIFIED CIVIL SERVICE.

As a public employer, the state of Michigan has a clear obligation to insure that minorities are fairly considered in hires and promotions. In fact, this Court in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), validated a private employer's decision to voluntarily implement a collectively bargained affirmative action plan. Subsequent lower court decisions, interpreting and applying *Weber,* have extended to the public sector the option of voluntary affirmative action.[4]

The Jackson Board of Education has the same responsibilities as the state of Michigan for providing equal employment opportunity. Both of these public employers made progress in meeting their obligations by adopting affirmative action plans and by bargaining with their employees to include race-conscious layoff provisions in their employment contracts.

making review of only one position inadequate. Therefore, MEEBOC undertook review of all hires and promotions for a specified time period. Departments which proposed appointments unrepresentative of the racial and ethnic minorities, women, and handicappers available in the state were required to describe their efforts to achieve a representative pool of candidates, and to demonstrate that full consideration was given to all qualified candidates. The Early Retirement Monitoring Report for the time period from June 3, 1984, through May 22, 1985, shows that a total of 7,713 hires and promotions were made, and 5,463 or 70.8% of those appointments went to white employees.

[4]

See, e.g., *Bratton,* 704 F.2d at 884 n. 18; *La Rivere v. Equal Employment Opportunity Comm'n,* 682 F.2d 1275, 1278-79 (9th Cir. 1982).

In state of Michigan employment, all collective bargaining organizations have agreed to deviate from last-in, first-out seniority layoffs in an attempt to retain recently-hired racial and ethnic minorities. The Michigan State Employees Association (MSEA) represents approximately 26,000 state workers and has included out-of-line layoff provisions in employment contracts with the state since 1980. The present contract provides that, "the employer may lay off and recall out-of-line seniority because of: . . .(e) maintaining an affirmative action program approved by MEEOC or its successors. . ." *Collective Bargaining Agreement, state of Mich. and MSEA, art. 12 § D-6(e) (1983-84).* This language is replicated in the employment contract between the State and the American Federation of State, County and Municipal Employees (AFSCME), which represents 6,900 employees. *Collective Bargaining Agreement, state of Mich. and AFSCME art. XIII § C-3(e) (1983-86).*

The remaining union employees (about 9,100) have also agreed to similar out-of-line layoff provisions in their contracts with the state of Michigan.[5] In particular, the Michigan State Police Troopers' employment contract 1984-86, contains an affirmative action exception to seniority layoffs, "to continue or initiate a Department of Civil Service-approved selective certification, or to administer an affirmative action program in accordance with Executuive Order 1983-4, or its successor, and pursuant to Civil Service Commission approved guidelines and procedures." *Collective Bargaining Agreement, state of Mich. and Mich. State Police Troopers Ass'n, art. 12 § 6-b(1) (1984-86).* In sum, all state employees, either through their collective bargaining agreements or through Civil Service Commission Rule § 2-19.3d (1983), are obligated to follow out-of-

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[5]

These unions are Local 31-M Service Employees International Union (SEIU); Corrections Organization (MCO); Michigan Professional Employees Association; and Michigan State Police Troopers Association.

line layoff provisions. It is apparent that the state and its employees have acknowledged the vital importance of affirmative action goals and attempted to realize these goals by affirmative action exceptions to seniority-based layoffs.

Further evidence of the state's commitment to fulfill its obligations as a public employer to provide equal employment opportunity include MEEBOC's 1985 proposal for an overall affirmative action plan for all state employment, and the Civil Service Commission's decision in August, 1984 to institute an affirmative action training program for all managers in state government.

III. THE LAYOFF PROVISIONS IN THE JACKSON BOARD OF EDUCATION-JACKSON EDUCATION ASSOCIATION'S COLLECTIVE BARGAINING AGREEMENT ARE CONSISTENT WITH ITS SETTLEMENT AGREEMENT WITH THE MICHIGAN CIVIL RIGHTS COMMISSION.

The Michigan Civil Rights Commission has a unique interest in the controversy surrounding the Jackson Board of Education's use of affirmative action exceptions to seniority layoffs. The Michigan Constitution assigns to the Civil Rights Commission jurisdiction over complaints of unlawful discrimination. The Commission is given broad power both to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by the constitution, and to secure the equal protection of such civil rights without such discrimination. *Mich. Const. art. 5, § 29.* In accordance with the latter responsibility, the Commission together with the state Board of Education issued a Joint Policy Statement in 1966 announcing that:

> The State Board of Education and the Civil Rights Commission emphasize also the importance of democratic personnel practices in achieving integration. This requires making affirmative efforts to attract members of minority groups. Staff integration is a necessary objective to be considered by administrators in recruiting, assigning, and promoting personnel. Fair employment practices are not only required by law, they are educationally sound.
>
> Michigan Civil Rights Commission and State Board of Education, Joint Policy Statement (April, 1966)

This policy expression highlights the importance of insuring equal employment opportunity within the context of establishing a program for equality of educational opportunity.

The Jackson Branch NAACP filed a Complaint in 1968 with the Michigan Civil Rights Commission alleging discriminatory practices by the Jackson Board of Education, *Mich. Civil Rights Comm'n, Complaint No. 6485,* filed by Jackson Branch NAACP (1968) (Att. A). Pursuant to its constitutuional obligations, the Commission investigated the allegations and sought to remedy the apparent violations by negotiating an order of adjustment with the Jackson Board. In this settlement the Board agreed "to take affirmative steps to recruit, hire and promote minority group teachers and counselors as positions become available and pursue other programs now in progress to provide equality of opportunity." *Mich. Civil Rights Comm'n, Notice of Disposition, Complaint No. 6485, filed by Jackson Branch NAACP, II § 5 at 3 (1968)* (Att. B.). Amici submit that the out-of-line seniority layoff provisions in the Jackson Board of Education's employment contracts with its teachers since 1972 are consistent with overall desegregation efforts undertaken in compliance with the Commission's order of adjustment.

IV. THE EFFORTS OF THE JACKSON BOARD OF EDUCATION TO INSURE EQUAL OPPORTUNITY.

In its capacity as a public employer, the Jackson School Board has a legal responsibility to insure that minorities are not discriminatorily disqualified from employment. The instant case focuses particularly on the layoff aspect of employment.

Since layoffs have been inevitable in Michigan's educational community due to the economy and declining enrollment, and since strict seniority-based layoffs would have a disparate impact on minorities, the Jackson School Board met its duty not to discriminate against minorities when it agreed with the teachers' union not to lay off a greater percentage of black teachers than their representation in the teacher work force.

The contractual provision in effect since 1972 of the collective bargaining agreement between the Jackson Education Association and the Jackson Board of Education provides:

> In the event it becomes necessary to reduce the number of teachers through layoffs from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnl laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance.
>
> Professional Negotiations Agreement, Jackson Board of Education and Jackson Education Association, art. XII, § B-1 (1972-1973).

The terms of this layoff program protect increases in minority hiring from dissolution through the layoff procedure. If a strict seniority-based layoff procedure had been followed by the Jackson Board of Education, minority teachers would have been virtually eliminated. The out-of-line layoff provision more evenly distributes the burden of a personnel reduction on all teachers. The School Board's attempts to remedy chronic underrepresentation of minorities among its personnel comports with its responsibilities as a public employer.

Like the state of Michigan's affirmative action efforts, the Jackson Board of Education's affirmative action plan is voluntary, and not in response to any judicial finding of past discrimination. In *University of California Regents v. Bakke*, 438 U.S. 265, 364 (1978) (Brennan, J., dissenting in part), Justice Brennan's opinion in which Justices Marshall, White and Blackmun concur, states that:

> Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race conscious remedial action would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of the law. And, our society and jurisprudence have always stressed the value of voluntary effort to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its past effects rather than a prerequisite to action.
>
> 438 U.S. at 364.

Another parallel between the state's affirmative action efforts and those of the Jackson Board of Education is that in each case out-of-line layoff provisions result from collective bargaining. Both state employees and Jackson teachers recognize the benefits of having an integrated work environment and have therefore agreed to out-of-line layoff terms in their

employment contracts. As described above, (p 12) represented state employees support the adoption of employment contracts containing affirmative action language and have renewed such contracts since 1980. The Jackson Education Association first voted to include the out-of-line layoff language in its 1972 contract. *Professional Negotiations Agreement, Jackson Bd. of Ed. and Jackson Ed. Ass'n, art. XII, § B-1 (1972-73).* Affirmative action goals are also set forth in that agreement, including the Association's acknowledgment of gross underrepresentation of minority personnal in the Jackson School District. *Id. art. VII.* Both of these provisions, arts. VII and XII, have appeared in the Jackson teachers' contract since 1972, and are included in the contract presently in effect. *Professional Negotiations Agreement, Jackson Bd. of Ed. and Jackson Ed. Ass'n. art. IX § D-3, 4 (1983-85).*

V. POLICY CONSIDERATIONS SUPPORTING PUBLIC EMPLOYERS' USE OF OUT-OF-LINE SENIORITY LAYOFF PROVISIONS.

There are strong policy considerations compelling public employers to make race-conscious employment decisions absent a prior judicial finding of intentional discrimination. Michigan has a fundamental interest in maintaining a representative work force that adequately reflects the diversity of the citizens it serves. Moreover, the state is responsible for the enforcement of laws prohibiting discrimination in the public and private sectors. Since state law requires both sectors to maintain nondiscriminatory work environments, the state as an employer must be bound by the same standard. Because it is a major employer with approximately 55,000 employees, the state's personnel decisions have repercussions on the employment environment throughout Michigan.

Providing equal educational opportunity is also an area of substantial state concern. A racially segregated school system

deprives minority children of benefits they would receive in a racially integrated school system, *Brown v. Board of Education*, 347 U.S. 483, 493-494 n.11 (1953). This Court has recognized a state's obligation to make race-conscious efforts to compensate for the continuing impact of segregation, *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971).

The state also has a significant interest in ameliorating the disabling effects of identified discrimination. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980). An employer's voluntary decision to undertake affirmative action programs to erase manifestracial imbalance in employment does not violate Title VII, 452 U.S.C. 2000e (1964). *Weber*, 443 U.S. at 207; *Bratton*, 704 F.2d at 884.

VI. THE DECISION IN WYGANT MUST BE AFFIRMED TO ALLOW PUBLIC EMPLOYERS TO CONTINUE TO PROVIDE EQUAL EMPLOYMENT OPPORTUNITY TO ALL.

A finding for petitioner will have far-reaching effects because it will seriously jeopardize the state of Michigan's progress toward achieving equal opportunity through affirmative action. The contracts between the State and its employees, like contract at issue, contain affirmative action exceptions to last-in, first-out seniority layoffs. In both cases, the inclusion of this language in the contracts is the result of voluntary collective bargaining by union and management representatives. Out-of-line layoff provisions have advanced the goals of equal employment opportunity by insulating a percentage of minorities from the disproportionate impact of a strict seniority layoff. Minorities constitute a preponderance of last hired employees since their hiring results in part from recent compliance by employers with equal opportunity statutes. Attempts to increase the minority representation in any given

work force can be frustrated due to the necessity of layoffs in times of economic recession. Consequently, minority employees are especially vulnerable to strict seniority layoff procedures.

A finding by this Court that collectively bargained, out-of-line seniority layoff provisions are constitutionally permissible will allow public employers to continue affirmative action policies. A decision negating these layoff provisions may inhibit voluntary affirmative action efforts and seriously impede progress towarded segregation in the work force. If this Court disallows collectively bargained out-of-line seniority layoff, the objectives of federal and state employment discrimination statutes will be thwarted.

CONCLUSION

The state of Michigan's commitment to equal employment opportunity in the public sector has been steady and successful over time. Further efforts are necessary to ensure that all civil service employees are guaranteed equal employment opportunity at all levels of state employment. Continuing progress through affirmative action by the state of Michigan may be deterred by constitutional challenges if this Court reverses the Sixth Circuit Court of Appeals' decision in *Wygant*. In the long run, a decision that is adverse to Respondent in this case will cause severe disruption in the struggle to achieve equality of opportunity in employment for all.

In view of the similarity between Michigan's and the Jackson School Board's voluntary affirmative action efforts, and in

view of Michigan's longstanding commitment to equal employment opportunity, *amici* Michigan Civil Rights Commission and the Michigan Department of Civil Rights respectfully urge this Court to affirm the Sixth Circuit's decision.

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The Attorney General gratefully acknowledges the assistance of Karen E. Slove with preparation of this brief amicus curiae.

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No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BRZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR JACKSON EDUCATION ASSOCIATION, AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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BRIEF FOR JACKSON EDUCATION ASSOCIATION, AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

This brief, *amicus curiae*, is filed by the Jackson Education Association with the consent of the parties, pursuant to the Rules of this Court.

INTEREST OF AMICUS

The Jackson Education Association ("JEA") is an employee organization, which since the mid-1960's has been recognized pursuant to Michigan law as the exclusive collective bargaining representative for the teachers employed by respondent Jackson Board of Education ("School Board"). JEA is a party to the collective bar-

gaining agreement that contains the affirmative action layoff provision at issue in this case.[1] Inasmuch as the Court is being asked to determine whether this provision is lawful or unlawful, JEA has a substantial interest in the outcome. Indeed, the very integrity of its collective bargaining agreement is at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Bakke, Weber and Fullilove*,[2] several members of the Court expressed the view that evidence as to the background and purpose of race-conscious affirmative action measures is important, and even may be decisive, in determining whether the measures are lawful. The record in this case is virtually silent with regard to these matters: there was no discovery, no affidavits were filed, and the case was not tried on the merits. The lower courts sustained the contested provision on the pleadings and the limited facts that the parties placed before them.

Petitioners and various of their supporting *amici* argue that the judgment below cannot stand without certain facts that do not appear in the record. They urge the Court to reverse on the basis of the limited record before it.

JEA's national and state parent organizations, the National Education Association and the Michigan Education Association, have filed an *amicus curiae* brief in support of respondents. Although agreeing with respondents that the judgment below should be affirmed on the present record, they offer an alternative ground for upholding the challenged affirmative action layoff provision—*i.e.*, that the provision would in any event be lawful if it was

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[1] JEA was not named as a defendant in this lawsuit, and did not participate in the proceedings below.

[2] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1979).

adopted by the school board as part of a comprehensive program designed to remedy the effects of its past educational discrimination and achieve a fully integrated school system. There may be, however, insufficient evidence in the present record to indicate whether this in fact was the purpose of the contested provision.

JEA also supports respondents' position that the judgment of the lower court should be affirmed on the present record. If the Court disagrees, however, it should not hold the challenged affirmative action layoff provision invalid on the basis of the limited record that is before it. There is, in fact, a substantial body of evidence as to the background and purpose of the challenged affirmative action layoff provision that could be presented at trial. This evidence is contained in the official records of several prior administrative and judicial proceedings involving the School Board.[3] Because JEA was a party to or otherwise involved in these prior proceedings, it is fully familiar with the evidence in question. The purpose of this *amicus curiae* brief is to bring this evidence to the attention of the Court, and demonstrate that if a more complete record is necessary to sustain the contested provision, such a record can be developed.

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[3] We have been informed that the School Board intends to lodge copies of these records with the Court.

ARGUMENT

A. The Challenged Contract Provisions

This litigation has its roots in the collective bargaining agreement that was negotiated in 1972 between the School Board and JEA. Like other labor agreements, collective bargaining agreements entered into by the School Board and JEA are short-term contracts, lasting from one to three years. The 1972 agreement expired in the spring of 1973; in six successive contracts, the School Board and JEA included language essentially identical to the relevant provisions of the 1972 contract.[4]

These contracts contain three primary race-conscious provisions governing, respectively, the hiring, assignment and laying off of teachers. Although petitioners challenge only the constitutionality of the layoff provision, we summarize each of these provisions, because the relationship among them is of some importance.

Article VII(D)(1) provides that the School Board will take affirmative steps to recruit minority teachers:

> The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy actively seeking minority group personnel. . . . The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.[5]

This provision does not require the School Board to hire a particular number or proportion of black teachers in any given year. In practice, the proportion of blacks among

[4] The various race-conscious provisions contained in the 1972 contract are numbered differently in several of the later contracts. For simplicity we refer to those provisions, as did petitioners, by the article numbers they bore in the 1972 contract—the first contract in which they appear.

[5] J.A. 15.

newly hired teachers has varied widely since Article VII was agreed to.[6] During the first ten years Article VII was in effect, no progress was made toward arriving at a faculty whose diversity matched the diversity of the Jackson student population. In the 1971-72 school year, the proportion of minority teachers was just over half the proportion of minority students.[7] Eleven years later, in 1982-83, the proportion of minority teachers was still just over half the proportion of minority students.[8]

The assignment of teachers to particular schools is governed by Articles VII(D)(3) and VIII(E)(2). Article VIII(E)(2) empowers the Board to transfer teachers in order to achieve "acceptable racial balance standards."[9] Article VII(D)(3) defines the range of "acceptable racial balance" in such a way that the School Board may initiate involuntary transfers if the percentage of minority teachers at a given school is less than one-half, or more than twice, the systemwide proportion of minority teachers.[10] The proportion of minority teachers to be assigned to a given school is not in any way tied to the proportion of minority students at that school. Rather, the evident purpose of Articles VII(D)(3) and VIII(E)(2) is to assure a reasonably even distribution of white and minority teachers throughout the school system, without regard to differences in the distribution of minority students.

The layoff provision at issue in this case appears in Article XII(B)(1):

[6] The 1981 seniority list contains 20 teachers hired in 1972, of whom 8, or 40%, were black. On the other hand, among those hired in 1976 and 1977, respectively, the proportion of blacks was 0% and 18%. J.A. 87-100.

[7] Pet. App. 21a.

[8] J.A. 103, 108.

[9] J.A. 22.

[10] J.A. 16. The systemwide proportion is determined separately for the elementary, junior high, and high school levels. *Id.*

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* (Emphasis added).[11]

By its express terms, Article XII(B)(1) maintains the proportion of minority faculty at whatever level it may be when layoffs are ordered. Inasmuch as the proportion of minority faculty never has reached the proportion of minority students in the school system,[12] the operative effect of Article XII to date has been to preserve the progress that has been made toward reaching that goal.

The history of these contract provisions is reflected in the records of several administrative and legal proceedings: beginning with a 1969 complaint before the Michigan Civil Rights Commission, and continuing with lawsuits filed in both federal and state courts, *Jackson Education Association v. Board of Education of the Jackson Public Schools*, Civil No. 4-72340 (E.D. Mich.) (*"Jackson I"*), and *Jackson Education Association v. Board of Education of the Jackson Public Schools*, No. 77-011484CZ (Jackson County Circuit Ct.) (*"Jackson II"*). We discuss each of these proceedings in turn below.

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[11] J.A. 13. Notwithstanding the apparently straightforward language of the first part of this provision, other provisions of the collective bargaining agreement dictate that layoffs are not made simply on the basis of district-wide seniority. Layoffs are made within each school from among teachers occupying the particular type of position to be eliminated. Thus, if the Board decided to lay off a physics teacher at one school, the displaced teacher might well have more seniority than an English teacher at that school, or a physics teacher at another school. Under some but not all circumstances, a senior displaced teacher can "bump" a more junior teacher with the same specialty who is working at another school. J.A. 23-28.

[12] J.A. 103, 108.

B. The 1969 Proceedings Before the Michigan Civil Rights Commission

On April 14, 1969, the Jackson Branch of the NAACP filed a complaint against the Jackson public schools with the Michigan Civil Rights Commission, alleging "discrimination in equal educational opportunities."[13] The complaint charged that students in the Jackson public schools, and especially in Frost Junior High School, were suffering discrimination in curriculum and in discipline,[14] that teachers and administrators had "lower expectations of black students" and "interact[ed] negatively with black students on the basis of preconditioned methods and techniques of dealing with black students,"[15] and that counselors were not "sensitive to the needs of black students" and did not "relate to releasing the educational and emotional potential of black students."[16] The complaint also singled out the near-absence of black professional employees throughout the Jackson school system as one of the practices that discriminatorily affected black students, alleging that "Frost and the Jackson Public Schools are discriminatory in hiring practices."[17]

When the Commission investigated the complaint, the Superintendent of Schools reported to the investigator that out of a teaching and administrative staff of 697, "there are now 31 certified black personnel presently in the system, 7 of whom were hired since September 1968. . . . He stated it is the usual procedure to accept applications at the Central Administration Personnel Office and referrals are then sent to various schools to be inter-

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[13] Michigan Civil Rights Commission Complaint No. 6485-ED (April 14, 1969).

[14] *Id.* ¶¶ 1-3.

[15] *Id.* ¶ 4.

[16] *Id.* ¶ 6.

[17] *Id.* ¶ 5.

viewed by principals where openings may exist. It is generally the principal's decision whom he will employ on his staff." [18] The Superintendent acknowledged that the "imbalance" of black teachers in the system was unacceptable,[19] and, indeed, the facts provided by the Superintendent to the MCRC investigator showed that eight of nine all-white elementary schools had all-white faculties, while fully half of the black teachers were concentrated in just two elementary schools, which were 72% and 79% black.[20]

Based on these and other facts, the Commission issued a preliminary report concluding that "each of the allegations as stated in the complaint can be substantiated based upon organizational records, court files, school records, special committee reports and the appraisal conducted by the Superintendent of Schools." [21] In the face of these preliminary investigative findings, the School

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[18] Complaint No. 6485-ED, Preliminary Investigation Report, pp. 7, 11 (June 16, 1969). The investigatory report also included a detailed account of the information provided by one local black leader: "According to Mr. White, through his hundreds of contacts with families and students since 1962, the black community believes the lack of black teachers lies with the personnel office who have in the past failed to refer black applicants to openings throughout the system and sent them only to inner city, racially imbalanced black elementary schools. He named 6 certified black teachers, residents of Jackson, who are presently teaching in another system as a result of previous denial of employment in the Jackson School system. He stated there are many more young people who have left the community after receiving their degree because of the limited possibilities they envisioned within this school system." *Id.* at 8.

[19] *Id.* at 7.

[20] *Id.*, Exhibits 15 and 19. The all-white schools with all-white faculties were Cascades, Dibble, Firth, Griswold, Harrington, Ridgeway, Sharp Park, and Trumbull. The schools that were 72% and 79% black, respectively, were Helmer and McCulloch.

[21] *Id.* at 11.

Board did not admit that it had committed any unlawful discrimination, but it agreed on September 30, 1969, to a binding "adjustment," approved by the Commission. That agreement contained specific provisions dealing with each of the NAACP allegations that the Commission's investigation had documented. With regard to its employment practices, the Board agreed to:

> [t]ake affirmative steps to recruit, hire and promote minority group teachers and counselors as positions become available and pursue other programs now in progress to provide equality of opportunity.[22]

Less than one month later, a citizens' committee that earlier had been established by the School Board concluded that "equal opportunities do not exist for [minority] persons" in the school system.[23] It found problems in the curriculum, in discipline, in counseling, and in communication with the minority community. It also found "[a]n inadequate number of minority group professionals" [24] and recommended that affirmative steps be taken to recruit minority teachers.[25] The committee concluded that an increase in the number of minority teachers was essential for the education of black as well as white students.[26]

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[22] Notice of Disposition of Complaint No. 6485-ED, Paragraph II (5) (Sept. 30, 1969). This statement of what the School Board had agreed to do was immediately followed in the Notice of Disposition by this statement:

> The Commission recommends a review of teacher assignments to ascertain that equal opportunity and good balance is reflected at all schools from the standpoint of race, sex, age, educational background and experience of teachers.

Id.

[23] Report of the Racial Subcommittee to the Jackson Public Schools' Advisory Committee, adopted October 13, 1969, p. 5.

[24] *Id.* at 5.

[25] *Id.* at 1.

[26] *Id.* ("Jackson needs more qualified minority group teachers, administrators and counselors . . . . Minority group students . . .

C. *Jackson I*

The affirmative action layoff provision that is challenged in this case was first placed in the collective bargaining agreement between JEA and the School Board in 1972, and had to be implemented only a year later. In the spring of 1973, the School Board ordered a number of temporary layoffs, and the teachers to be laid off were selected in compliance with Article XII.[27] In 1974, when another round of layoffs was required, the School Board refused to apply Article XII, concerned that if it did so a white teacher adversely affected by the operation of that provision could bring suit claiming that Article XII was either unlawful or unconstitutional.[28] JEA brought suit in federal court to enforce its contract. It was joined as plaintiff by two black teachers who had been laid off as a result of the School Board's non-compliance with Article XII. The plaintiffs attempted to allege a federal cause of action under Title VII and asked the federal court also to exercise pendent jurisdiction over their claim for enforcement of Article XII under Michigan law.

Although the *Jackson I* litigation was dismissed after trial for lack of subject matter jurisdiction,[29] a signifi-

need to associate with persons of their own ethnic extraction who have proven levels of achievement. White students have to grow up in schools where successful minority group professional people are more frequent because the attitudes these students form in their school years are the attitudes they carry through life.")

[27] Transcript of Proceedings, March 31, 1976, in *Jackson I*, at 47-48 (hereinafter cited as "*Jackson I* transcript").

[28] At the hearing in *Jackson I*, counsel for the School Board explained the dilemma confronting the Board, noting that it "is faced with a choice under this case of either this kind of action or a suit on tenure by the displaced white teacher or for that matter a federal action being brought by those teachers . . . alleging that what we have is a quota system which is itself violative of the Civil Rights Act." *Jackson I* transcript at 57.

[29] J.A. 34.

cant amount of evidence regarding the background of Article XII was presented in that proceeding, particularly in the form of testimony by the JEA official and the school superintendent who originally had negotiated the provision. That background begins with the history of desegregation of the Jackson public schools.

Prior to 1960, almost all of the black students in Jackson were assigned to a few schools within the school system, a situation the School Board apparently regarded as improper in light of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In 1963, the boundary lines for the city's two high schools were redrawn in such a way that the proportion of minority students in the two schools was equalized.[30] Six years later, the School Board redrew the boundary lines for assigning students to junior high schools, thus eliminating any racial identifiability of those schools.[31] The integration of the elementary schools proved a considerably more difficult matter, and it was the subject of a series of studies and proposals from 1969 until the School Board finally ordered a desegregation plan into effect for the 1972-73 school year.[32]

The desegregation of the elementary schools presented three distinct, though historically related, problems. First, black elementary students were overwhelmingly concentrated in a handful of the city's twenty elementary schools. In the school year 1966-67, over 84% of all

[30] Deposition of Lawrence Read, May 16, 1975, at 6 (hereinafter cited as "Deposition of Lawrence Read"). Dr. Read was Superintendent of the Jackson schools from 1968 until 1973. The deposition is part of the record in *Jackson I*.

[31] *Id.* 7-8.

[32] The Appendix to this Brief contains tables showing the racial composition of each of Jackson's schools, both for students and faculty, as published by the United States Department of Health, Education, and Welfare for every other school year between 1966 and 1973. We are informed that data are not published for the other years in that period.

minority students in the elementary grades were assigned to just four schools, while nine schools were at least 99% white.[33] Second, prior to this time, there had been a policy of "placing of the majority of black staff persons in predominantly black schools." [34] As late as the 1971-72 school year, there were no minority teachers at 13 of the elementary schools.[35] Third, until the mid 1950's, the School Board had never hired a minority teacher, and as of the late 1960's, the Board had chosen to hire only a "negligible" number of minority teachers.[36] The 1981 seniority list contains the names of 80 teachers hired between 1964 and 1966; all of them are white.[37]

To assist it in formulating a plan for integrating the elementary schools, the School Board appointed several committees, conferred with JEA, and established an office of minority affairs. In October of 1969, the first of those committees issued a report calling for immediate action to redraw the elementary school boundaries to improve racial balance, and the adoption of whatever steps might be necessary to achieve "full and equal integration of the Jackson Elementary Schools by September of 1972." [38] This proposal recognized that faculty integration was an integral part of a desegregation effort, urg-

[33] Appendix to Brief, 1966-67 Table.

[34] Plaintiffs' Exhibit 4, *Jackson I*, Recommendation of Minority Affairs Office.

[35] Deposition of Lawrence Read at 52.

[36] Deposition of Lawrence Read at 4. The first black teacher was hired in 1953. Pet. App. 20a. During the 1966-67 school year, only 3% of the faculty was non-white. Plaintiffs' Exhibit 15, *Jackson I*. *See also* Deposition of Lawrence Read at 22-23.

[37] J.A. 68-75.

[38] Plaintiffs' Exhibit 1, *Jackson I*, Recommendations of Jackson Public Schools Ad Hoc Committee, p. 2. The committee consisted of the superintendent of schools, four principals, one teacher, and the JEA Executive Secretary.

ing that by the fall of 1970, there be an "integrated staff at each elementary school with a minimum of two minority group teachers in each school." [39] In 1969, the School Board adopted this report as its official policy.[40] The recommendation of the 1969 report regarding faculty could not be immediately implemented, however, in part because there were so few minority teachers then employed as elementary school teachers. The school superintendent explained that as of 1969, forty additional minority teachers would have had to be hired to have a sufficient number to place two at each school.[41]

Subsequently, a second committee appointed by the School Board undertook to study the problem of integrating the elementary schools in more detail. Despite a storm of community controversy, the committee itself favored "the adoption of total racial integration as soon as possible," a step that it concluded would require busing.[42] But the elementary school principals did not support "total racial integration of the elementary schools at this time" and a large majority of the parents were "strongly opposed" to busing.[43] For those reasons, the majority of the committee,[44] over a strong dissent,[45] proposed a desegregation plan that involved no busing. The committee also recommended the "integration of . . .

[39] *Id.* at 1. The report also recommended "[p]rofessional growth experiences for the staff in order to develop an awareness of, and sensitivity to, the problems of minority groups in our schools." *Id.*

[40] Deposition of Lawrence Read at 10, 11.

[41] *Id.* 10; Proposed Joint Pre-Trial Order, *Jackson I*, p. 2.

[42] Plaintiffs' Exhibit No. 2, *Jackson I*, "Elementary School Redistricting Recommendations," at 3.

[43] *Id.* at 3.

[44] *Id.*, unnumbered pages.

[45] *Id.*, "Addenda to Redistricting Subcommittee Report, comments of Mary Ann Alber, Alonzo Littlejohn, Carl Breeding, Bruce Wilkins."

the teaching staff throughout the district"; on this recommendation, there was no dissent.[46]

Following a series of public hearings, the School Board concluded that these committee recommendations would not accomplish desegregation of the elementary schools, and applied for a federal grant to study alternative methods for effective desegregation. After almost a year of study, the School Board's official Citizens Advisory Committee presented four recommendations to the School Board. Those four recommendations were as follows:

1. "That all elementary schools be desegregated. It is recommended that all schools have a racial balance of between 11 and 21 percent black students. The optimum being 16 percent black."
2. "That desegregation be put into effect with the beginning of the 1972-73 school year; namely, the fall of 1972 and all possible efforts be made to integrate the schools as soon as possible."
3. "That the Board of Education direct the school administration to work towards a teaching staff, in the elementary schools, that also achieves a racial balance as close as possible to that of the students with a minimum of two black teachers in every school."
4. "That the method of desegregation be a Princeton and/or 45-15 type program." [47]

In March 1972, the School Board adopted the Citizens Advisory Committee's recommendations, and moved to integrate the schools beginning in the fall of 1972.[48]

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[46] *Id.* at 3. *See also id.* at 4 (urging "improving the mix of teachers").

[47] Plaintiffs' Exhibit 7, *Jackson I*, Report to Board of Education, Jackson Public Schools, from the Citizens Advisory Committee, dated Feb. 18, 1972.

[48] Deposition of Lawrence Read at 40, 46.

Testimony of the school superintendent shows that school officials believed that federal laws required these measures to desegregate the schools.[49] By the spring of 1972, a number of other school districts in Michigan had been named in federal desegregation suits or were already under federal court orders.[50] In a written explanation of the desegregation plan distributed to parents in April of 1972, the School Board explained why it was taking voluntary action rather than waiting for a court order:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. *Firmly established legal precedents mandate a change.* Many citizens know this to be true. Waiting for a court order emphasizes to many that we are quite willing to *disobey the law* until the court orders us not to disobey the law.[51]

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[49] Deposition of Lawrence Read at 65-68.

[50] *Id.* at 43.

[51] Plaintiffs' Exhibit No. 8, *Jackson I*, question 4 (emphasis added). The superintendent also testified that he had been warned by NAACP officials that the NAACP was prepared to file suit to force desegregation if the School Board did not act voluntarily. Deposition of Lawrence Read at 44. When the School Board postponed action on the desegregation proposal in early March 1972, *id.* at 40, 46, the NAACP filed a complaint with the Michigan Civil Rights Commission, alleging *inter alia* that the elementary schools were segregated, that the district was not committed to a timely desegregation process, and that over 40% of the black teachers were assigned to two elementary schools that were 60% and 86% black. Michigan Civil Rights Commission Complaint No. 14702ED (Mar. 17, 1972). This complaint was not investigated until 1974. At that time, on the basis of evidence that the schools had been desegregated in the interim and that as part of the desegregation plan affirmative action had been taken to cure the faculty imbalance, the MCRC ordered the complaint "dismissed without a finding as adjusted." Notice of Disposition, Complaint No. 14702ED (Aug. 30, 1974).

During the period from 1969 to 1972, while the problem of desegregation was still under discussion, the School Board began taking steps to deal with the scarcity of minority teachers that had been caused by its practices and that would stand in the way of effective desegregation. A provision on affirmative action was negotiated and placed in the 1970 collective bargaining agreement with JEA. It provided:

> The Board of Education and the Association in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. The goal of such policy shall be to have at least 15 percent of every building staff from minority racial groups.

The School Board acted in accordance with this declared policy of affirmative action, and succeeded in recruiting and hiring more minority teachers.[52] Between the 1967-68 school year and the 1971-72 school year, the number of minority teachers more than doubled, from 21 to 50.[53]

The problem that ultimately gave rise to Article XII occurred in 1970 and 1971, when declining enrollment required faculty layoffs. Under the collective bargaining agreement in effect at the time, teachers were laid off on the basis of seniority. Because a substantial majority of the district's minority teachers had been hired since 1969 and had limited seniority, the 1970 and 1971 layoffs substantially nullified the School Board's recent efforts to recruit and hire more non-white teachers. The effect of those layoffs, the school superintendent testified, was to "literally wipe out all the gain that had been made

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[52] *Jackson I* transcript at 18-19; Deposition of Lawrence Read at 5, 22.

[53] Plaintiffs' Exhibit 15, *Jackson I*.

in terms of affirmative action . . . ." [54] Minority teachers recruited and hired one year were simply laid off the following year.[55] Even worse, there was no end in sight. The district's enrollment was declining, and layoffs were to be anticipated in successive years as well.[56] If the School Board were to integrate the faculty, it could not simply proceed with layoffs based on seniority and rely on being able to recall the laid-off teachers after a short time.

This layoff problem led to a series of meetings among the School Board's administrators,[57] between School Board and JEA officials,[58] and between JEA leaders and representatives of the minority teachers.[59] By the beginning of 1972, JEA's officers had already begun to consider possible alternatives to the seniority layoff rule because JEA recognized that some modification of the rule was necessary to bring about faculty integration.[60]

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[54] Deposition of Lawrence Read at 24.

[55] *Id.*

[56] *Jackson I* transcript at 20. Indeed, at the trial of *Jackson I* in 1976, there was testimony that the declining enrollment had continued "to dictate teacher layoffs each year." *Id.* The enrollment figures, declining steadily from 1968-69 through 1975-76, appear in Plaintiffs' Exhibit 15, *Jackson I*.

[57] *Jackson I* transcript at 25.

[58] Deposition of Lawrence Read at 29.

[59] *Id.* at 35.

[60] *Jackson I* transcript at 29-30. The 1972 desegregation plan, as noted above, again had called for at least two minority teachers in every school. Page 14, *supra*. There were still too few minority teachers in the system to meet that goal. *Jackson I* transcript at 27.

In January of 1972, the Minority Affairs Office circulated to the teachers a questionnaire soliciting their views on such alternatives. JEA's leaders regarded this as an unfair labor practice and instructed JEA members to respond by favoring continuation of the seniority rule. JEA's leaders adopted this measure solely as a negotiating tactic, and did not intend for the response to reflect the views of JEA or its members. *Id.* at 25, 29.

In the summer of 1972, very shortly after the School Board had adopted its desegregation plan, the collective bargaining agreement between the School Board and JEA was renegotiated. In response to the problem of layoffs wiping out all progress in minority hiring, the School Board proposed a complete freeze on layoffs of minority teachers until the proportion of such teachers reached 15%.[61] JEA strongly opposed this proposal.[62] The parties ultimately adopted Article XII, as a compromise measure that protected the School Board's progress in hiring the minority teachers that it needed for implementation of its desegregation plan but that did not place the entire burden of layoffs on white teachers.[63] Although JEA went on strike in the fall of 1972, it did so over other issues, not the layoff rules.[64]

The JEA leadership favored the Article XII compromise. JEA's members were of the opinion that more minority teachers were needed, and Article XII was seen to be necessary to achieve the widely accepted goal of "having minority teachers in every building" and "to correct past problems." [65] In 1973, following a change in membership on the School Board, the Board proposed deleting Article XII from the collective bargaining agreement, but JEA successfully insisted that Article XII remain in the agreement.[66]

The school superintendent and the JEA official who had negotiated Article XII gave similar explanations for that

[61] Deposition of Lawrence Read at 28; *Jackson I* transcript at 31.

[62] Deposition of Lawrence Read at 28-29.

[63] *Id.* at 32-34; *Jackson I* transcript at 35; Proposed Joint Pre-Trial Order, *Jackson I*, p. 3.

[64] *Jackson I* transcript at 39-40, 43; Deposition of Lawrence Read at 59.

[65] *Jackson I* transcript at 42-43.

[66] *Id.* at 50-51.

provision in their testimony in *Jackson I*. First, Article XII was regarded as an "integral part" of the desegregation plan; without the protection it afforded to minority teachers, the School Board could not have achieved the repeatedly expressed goal of desegregating the faculty and placing two minority teachers in each school.[67] Second, the limited protection offered by Article XII was regarded as essential to the School Board's future ability to attract and hire minority teachers. The Jackson School Board hires many of its teachers from colleges outside of, and often long distances from, Jackson. Many of the minority teachers whom Jackson wanted to attract were from southern colleges, and those teachers were reluctant to move to Michigan if they faced an imminent threat of layoff.[68] The layoffs of large numbers of minority teachers in 1970 and 1971 made it far more difficult for the School Board to recruit these teachers,[69] and the absence of Article XII would have "cripple[d] . . . greatly" the School Board's efforts to recruit minority teachers.[70] Third, both the School Board and JEA were

[67] Deposition of Lawrence Read at 69 (without the layoff provision "[e]verything else is in danger, if not destroyed"); *Jackson I* transcript at 20 (change in layoff rules needed "to prevent the fruits of recruitment from being wiped out the following spring"); *id.* at 42 ("if we didn't do some modifications in the seniority system, we certainly weren't going to achieve the goals we were talking about before"); Proposed Joint Pre-Trial Order, *Jackson I*, pp. 2-3 ("the active minority recruitment program was . . . suffering from the impact of continuing layoffs dictated by economic circumstances and magnified by the straight systemwide seniority system mandated by the existing collective bargaining agreement. To correct this situation, and to 'end up with a truly integrated school system,'" the Board and JEA agreed to adopt Article XII).

[68] *Jackson I* Transcript at 55; Deposition of Lawrence Read at 73-75.

[69] *Jackson I* transcript at 20.

[70] *Id.* at 56; see also *id.* at 55 (convincing minority teachers to move to Jackson from the South was particularly difficult without Article XII).

persuaded that to provide an effective education, particularly for minority students, it was necessary to have a substantial number of minority faculty members.[71]

The litigation in *Jackson I* was resolved without addressing the merits of the claims in that dispute or the claims raised in this case. In *Jackson I*, the plaintiffs alleged that prior to 1972 the School Board, in violation of Title VII of the 1964 Civil Rights Act, and of the Fourteenth Amendment, had engaged in practices that had the effect of discriminating on the basis of race in the hiring of teachers.[72] The district court concluded that it lacked jurisdiction over the subject matter of the action.[73] The court reasoned that the basic controversy between the parties was the School Board's refusal to comply with the collective bargaining agreement. The plaintiffs' claim, therefore, was simply a contract claim arising under state law, and "[a]ny federal claim advanced by plaintiffs was advanced to set forth a pretextual jurisdictional basis so that the court could decide the real dispute between the parties—the contractual claim." [74]

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[71] *Jackson I* transcript at 56:

> It is a great deal of help to both students and other staff in a particular school to have a mixed staff of minority teachers, black teachers on the staff. Gives the black students someone they can, you know, have an affinity with if they can look up to, if you will and it gives, I think if anything, more importantly more accurate and better picture if you will of minority people to white students . . . .

Deposition of Lawrence Read at 75:

> Q: . . . [w]hen you arrived at the conclusion to have the affirmative action program . . . you did that for education reasons?
>
> A. Well, yeah. I guess you could say that part of the educational setting is to present a multi-cultured environment. Children didn't see black people as maids and menials, that they saw them as professional people. And that . . . is education.

See also id. at 65-66, 76-77.

[72] J.A. 30-31, 34 n.3.

[73] *Id.* at 34.

D. *Jackson II*

Jackson I was dismissed on January 12, 1977.[75] Soon afterward, JEA filed a state court action against the School Board to enforce Article XII.[76] That case was *Jackson Education Association v. Board of Education of the Jackson Public Schools*, No. 77-011484CZ (Jackson County Circuit Court) ("*Jackson II*"). The pleadings and exhibits from *Jackson I* were made part of the record by stipulation in *Jackson II*, together with agreed statements of facts.[77] The School Board filed a motion for summary judgment on this record, arguing that Article XII violated the Michigan Teacher Tenure Act, the Michigan Civil Rights Act, and Title VII.[78]

The state court rejected the Board's motion for summary judgment and upheld Article XII. It held that Article XII was consistent with the state Teacher Tenure Act,[79] and that it violated neither Title VII nor the federal constitution.[80] Although the state court assumed

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[74] *Id.* at 37. The Court also held that it lacked jurisdiction over the asserted Title VII claim because plaintiffs had failed to comply with the procedural prerequisites for suit, and that although plaintiffs had amended their complaint to allege jurisdiction based on Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, *et seq.*, they had not alleged any facts that would constitute a violation of that statute nor had their proof established that the School Board's refusal to comply with the contract amounted to such a violation. J.A. 37-38.

[75] JEA appealed the district court's decision to the Sixth Circuit, but subsequently withdrew that appeal.

[76] J.A. 40-41.

[77] J.A. 41.

[78] J.A. 47.

[79] J.A. 44-47.

[80] J.A. 47-53.

that there had been no prior discrimination by the School Board against minority faculty members,[81] it concluded that the existence of such past discrimination was not required to uphold a race-conscious measure such as Article XII. The state court reasoned that the effective education of minority students required the School Board to take steps to overcome the effects of past societal discrimination that had earlier limited the number of minority teachers hired by the Board.

> [H]ow can a minority child aspire to a teaching career or other career requiring an advanced education if a disproportionately small number of such minority teachers are represented in the school system?
>
> The effects of such daily observed societal discrimination discourage his ambition; the effects of such daily observed societal discrimination feed and encourage racial hatred and distrust of "whitey" . . . .[82]

The state judge declined to hold that race-conscious affirmative action could be lawfully promulgated only by a court, insisting that the democratic process and collective bargaining were the preferable method for resolving the difficult issues posed by efforts to overcome the effects of societal discrimination.[83] The court, therefore, entered a declaratory judgment that the School Board had violated Article XII, and directed the Board to pay damages to the minority teachers who had been injured by that violation.[84]

E. Significance of These Facts

The facts recited above show that substantial evidence is available in the records of earlier proceedings to establish that the provision challenged in this case was adopted

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[81] J.A. 43.

[82] J.A. 52.

[83] J.A. 52.

[84] J.A. 53.

by the School Board as part of a comprehensive program to desegregate its schools, to remedy the continuing effects of this past educational discrimination, and also to remedy its prior employment discrimination against minority teachers. Other briefs that are being filed in this action, including the brief of JEA's state and national parent organizations, the Michigan Education Association and the National Education Association, demonstrate that an affirmative action layoff provision such as that at issue here can be sustained as a lawful remedy for a school board's own past educational discrimination or as a lawful remedy for a board's own past employment discrimination. If the Court does not affirm the decision below on the grounds advanced by respondents or by their other supporting *amici*, it should not hold the challenged affirmative action layoff provision invalid on the basis of the present limited record. The case should rather be remanded for the development of a full record to inform the resolution of the extremely important issues presented.

CONCLUSION

For the reasons set forth in Respondents' Brief, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed. If the judgment is not affirmed, the case should be remanded for development of a full evidentiary record.

Respectfully submitted,

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APPENDIX

APPENDIX

JACKSON PUBLIC SCHOOLS 1966-1967

Source: *Public Elementary and Secondary Schools in Large School Districts with Enrollment and Instructional Staff, By Race, Fall 1967*, U.S. Dept. of Health, Education and Welfare, Office of Education, and National Center for Educational Statistics, Washington, D.C.: GPO, 1969. Data for Michigan in this publication were for the 1966-67 school year.

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
High Schools						
Jackson	1252	115	8.4	74	0	0.0
Parkside	1503	249	14.2	96	3	3.0
Junior High Schools						
East	588	119	16.8	35	4	10.3
Frost	831	173	17.2	44	2	4.3
Hunt	780	45	5.5	37	3	7.5
Elementary Schools						
Allen	397	180	31.2	30	4	11.8
Amy Firth	294	8	2.6	12	0	0.0
Austin Blair-Reed	294	29	9.0	8	3	27.3
Bennett	400	25	5.9	16	0	0.0
Blackman	242	65	21.2	12	0	0.0
Bloomfield	485	0	0.0	14	1	6.7

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
Cascades	492	2	0.4	15	0	0.0
Dibble	243	2	0.8	11	0	0.0
Griswold	521	1	0.2	18	0	0.0
Harrington	483	0	0.0	16	0	0.0
Helmer	145	345	70.4	21	3	12.5
Lincoln	322	31	8.8	13	0	0.0
Longfellow	412	0	0.0	15	0	0.0
Mathilda B. Honer	137	26	16.0	8	0	0.0
McCulloch	155	382	71.1	19	2	9.5
Ridgeway	362	0	0.0	12	0	0.0
Sharp Park	411	0	0.0	14	0	0.0
TA Wilson	390	11	2.7	18	0	0.0
Tomlinson	337	175	34.2	18	1	5.3
Trumbull	397	3	0.8	15	0	0.0
Total:	11,873	1986	14.3	591	26	4.2

JACKSON PUBLIC SCHOOLS 1968-1969

Source: *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group,* U.S. Dept. of Health, Education, and Welfare, Office for Civil Rights, Washington, D.C.: GPO, Fall, 1968

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
High Schools						
Jackson	1364	157	10.3	53	4	7.0
Parkside	1647	287	14.8	69	6	8.0
Junior High Schools						
East	634	141	18.2	26	4	13.3
Frost	792	234	22.8	43	1	2.3
Hunt	817	44	5.1	34	2	5.6
Elementary Schools						
Allen	428	120	21.9	25	3	10.7
Amy Firth	334	5	1.5	11	0	0.0
Austin Blair-Reed	286	34	10.6	9	1	10.0
Bennett	487	28	5.4	17	1	5.6
Blackman	209	74	26.1	10	0	0.0
Bloomfield	424	1	0.2	14	1	6.7
Cascades	417	0	0.0	14	0	0.0
Dibble	347	27	7.2	14	0	0.0
Griswold	512	10	1.9	17	0	0.0

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
Harrington	419	0	0.0	15	0	0.0
Helmer	108	327	75.2	14	2	12.5
Lincoln	305	101	24.9	14	1	6.7
Longfellow	407	6	1.5	14	0	0.0
Mathilda B. Honer	118	12	9.2	6	0	0.0
McCulloch	196	280	58.8	14	4	22.2
Ridgeway	334	0	0.0	11	0	0.0
Sharp Park	362	16	4.2	12	0	0.0
TA Wilson	369	15	3.9	15	0	0.0
Tomlinson	293	191	39.5	15	1	6.3
Trumbull	372	6	1.6	13	0	0.0
Total:	11,981	2116	15.0	499	31	5.8

JACKSON PUBLIC SCHOOLS 1970-1971

Source: *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group*, U.S. Dept. of Health, Education, and Welfare, Office for Civil Rights, Washington, D.C.: GPO, Fall, 1970

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
High Schools						
Jackson	1354	182	11.8	66	2	2.9
Parkside	1096	238	17.8	66	4	5.7
Junior High Schools						
East	530	157	22.9	28	4	12.5
Frost	754	118	13.5	34	5	12.8
Hunt	710	124	14.9	36	2	5.3
Northeast	651	122	15.8	37	1	2.6
Elementary Schools						
Allen	412	93	18.4	24	2	7.7
Amy Firth	272	16	5.6	10	0	0.0
Austin Blair-Reed	237	25	9.5	6	2	25.0
Bennett	441	24	5.2	18	0	0.0
Blackman	219	80	26.8	11	0	0.0
Bloomfield	413	4	1.0	13	1	7.1
Cascades	421	5	1.2	13	0	0.0
Dibble	267	14	5.0	9	0	0.0

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
Griswold	481	30	5.9	18	0	0.0
Harrington	310	2	0.6	10	0	0.0
Harrington Primary	137	1	0.7	5	0	0.0
Helmer	48	303	86.3	14	4	22.2
Lincoln	309	132	29.9	14	1	6.7
Longfellow	350	6	1.7	12	0	0.0
Mathilda B. Honer	152	18	10.6	5	1	16.7
McCulloch	165	300	64.5	15	4	21.1
Ridgeway	296	1	0.3	10	0	0.0
Sharp Park	299	13	4.2	10	0	0.0
TA Wilson	411	0	0.0	14	0	0.0
Tomlinson	272	181	40.0	16	1	5.9
Trumbull	315	6	1.9	10	0	0.0
Reed	57	4	6.6	2	0	0.0
Total:	11,379	2199	16.2	526	34	6.1

JACKSON PUBLIC SCHOOLS 1972-1973

Source: *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group,* U.S. Dept. of Health, Education, and Welfare, Office for Civil Rights, Washington, D.C.: GPO, Fall, 1972

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
High Schools						
Jackson	1297	229	15.0	52	3	5.5
Parkside	1200	245	17.0	49	3	5.8
Junior High Schools						
East	495	136	21.6	23	3	11.5
Frost	788	118	13.0	30	2	6.3
Hunt	654	115	15.0	31	2	6.1
Northeast	619	140	18.4	28	1	3.4
Elementary Schools						
Allen	392	87	18.2	19	2	9.5
Amy Firth	269	38	12.4	9	2	18.2
Bennett	373	76	16.9	16	2	11.1
Blackman	344	56	14.0	12	2	14.3
Bloomfield	337	56	14.2	12	1	7.7
Cascades	323	50	13.4	12	1	7.7
Dibble	221	58	20.8	9	1	10.0
Griswold	429	60	12.3	14	2	12.5

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
Harrington	245	29	10.6	8	1	11.1
Harrington Primary	88	20	18.5	4	0	0.0
Helmer	218	150	40.8	12	3	20.0
Lincoln	356	106	22.9	14	2	12.5
Longfellow	350	62	15.0	12	2	14.3
Mathilda B. Honer	121	28	18.8	6	0	0.0
McCulloch	194	100	34.0	10	2	16.7
Ridgeway	264	66	20.0	10	2	16.7
Sharp Park	288	56	16.3	12	1	7.7
TA Wilson	275	64	18.9	13	2	13.3
Tomlinson	323	78	19.5	16	2	11.1
Trumbull	335	54	13.9	11	2	15.4
Total:	10,798	2277	17.4	444	46	9.4

No. 84-1340 (14)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BRZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President, and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, CALIFORNIA TEACHERS ASSOCIATION, FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSOCIATION, GEORGIA ASSOCIATION OF EDUCATORS, MASSACHUSETTS TEACHERS ASSOCIATION, MICHIGAN EDUCATION ASSOCIATION, WASHINGTON EDUCATION ASSOCIATION, and WISCONSIN EDUCATION ASSOCIATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1340

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BRZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President, and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, CALIFORNIA TEACHERS ASSOCIATION, FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSOCIATION, GEORGIA ASSOCIATION OF EDUCATORS, MASSACHUSETTS TEACHERS ASSOCIATION, MICHIGAN EDUCATION ASSOCIATION, WASHINGTON EDUCATION ASSOCIATION, and WISCONSIN EDUCATION ASSOCIATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief, *amici curiae*, is filed by the National Education Association (NEA) and certain of its affiliates with the consent of the parties, pursuant to the Rules of this Court.

INTEREST OF *AMICI CURIAE*

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. The California Teachers Association, the Florida Teaching Profession-National Education Association, the Georgia Association of Educators, the Massachusetts Teachers Association, the Michigan Education Association, the Washington Education Association and the Wisconsin Education Association Council all are NEA state affiliates.

One of the principal objectives of NEA and its affiliates is to secure improvements in the terms and conditions of employment of educational employees. Toward that end, they engage in collective bargaining and otherwise represent these employees in dealing with their employers regarding terms and conditions of employment.

Although *amici* strongly believe that the seniority principle provides an objective and equitable standard on which to base employment decisions, including decisions regarding layoffs, their commitment to the seniority principle is not absolute. *Amici* believe that there are certain situations in which a rigid application of the seniority principle does not provide an appropriate basis for making employment decisions and some compromise in the principle is necessary. One such situation arises when, as part of an overall effort to remedy the effects of its past educational discrimination and fully integrate the school system, a school board seeks to achieve a racially diverse faculty by according preferential treatment to minorities in hiring, and—if necessary to preserve the progress that has been made as a result of this

preferential hiring—by also providing some protection for such minorities against layoffs.

The beneficial nature of an affirmative action program in any situation must be carefully balanced against the possible harm to affected parties, and *amici* believe that this balance is best made when the program is developed by the employer and the employee organization through collective bargaining or other equivalent forms of dialogue. Provisions for affirmative action in hiring and layoffs are included in many of the collective bargaining agreements between local affiliates of *amici* and public school employers. Because the Court is being asked in this case to decide whether a collectively bargained affirmative action provision that accords preferential treatment to minorities in layoffs is permissible under the 14th Amendment to the United States Constitution, *amici* have a substantial interest in the outcome. Moreover, the Jackson Education Association, which is a party to the collective bargaining agreement that contains the affirmative action layoff provision at issue, is a local affiliate of NEA and the Michigan Education Association.

Finally, because *amici* appear to be the only employee organizations filing a brief *amici curiae* in support of respondents, they provide a perspective that the Court otherwise would not receive.

INTRODUCTION AND SUMMARY OF ARGUMENT

In deciding this case, the lower courts applied the analysis set forth in the Court's employment discrimination cases, and on the basis of that analysis concluded that the affirmative action layoff provision at issue did not violate the rights of laid off non-minority employees under the Equal Protection Clause of the 14th Amendment to the United States Constitution. In challenging the lower courts' conclusion, petitioners and their supporting *amici* likewise cast this as a typical employment discrimination case and argue that the challenged layoff provision must be assessed—and justified—solely as a remedy for discriminatory employment practices. Al-

though we believe that petitioners and their supporting *amici* have misinterpreted this Court's employment discrimination jurisprudence and agree with respondents that the decision below should be affirmed under the principles of that jurisprudence, the issue presented in this case may be addressed from another perspective. We submit that an alternative ground for upholding the challenged affirmative action layoff provision may be found in the law of school desegregation.

This case concerns the authority of a school board to take appropriate steps to remedy the effects of its past educational discrimination and achieve a fully integrated school system.[1] The Jackson School System had a long history of schools racially identifiable as either "white" or "black"—*i.e.*, schools with a disproportionate number of white or black students. In order to remedy this situation, the Jackson School Board in the early 1970's voluntarily adopted a comprehensive desegregation program, an integral part of which was an effort to achieve a racially diverse faculty. The purpose of the challenged layoff provision was to preserve the progress that had been made toward the latter goal, and its validity properly should be assessed in that context. As one court explained in similar circumstances:

> The action of the school board was *not* directed toward the employment opportunities available to teaching faculty nor the elimination of any past discrimination in employment. We do not approach the issue in that frame of reference. *The focus of this action of the school board was to enhance the educational opportunities available to the students* by achieving better racial balance in the teaching faculty throughout the district. *This is an educational objective which has been well recognized and approved by the Supreme Court.*

Zaslawsky v. Board of Education, 610 F.2d 661, 664 (9th Cir. 1979) (emphasis added).

[1] The facts that show the connection between the challenged affirmative action layoff provision and the desegregation of Jackson's schools are set forth in the Statement of the Case in Respondent's Brief and also in the Brief *Amicus Curiae* filed by the Jackson Education Association. Certain of these facts are summarized in Part II of the Argument section of this brief.

When analyzed in these terms, the legal inquiry before the Court is whether, as part of an overall program to remedy the effects of its past educational discrimination and achieve a fully integrated school system, a school board voluntarily may adopt an affirmative action layoff provision of the type at issue without violating the Equal Protection Clause of the 14th Amendment.[2] We address this question in Part I of the Argument section of this brief, and in support of an affirmative answer show the following:

1. A school board may use race-conscious measures to promote a sufficiently compelling governmental interest. The obligation of a school board to remedy the effects of its past educational discrimination and achieve a fully integrated school system constitutes such a compelling interest. (Part I(A)).

[2] This question has significance quite apart from whether, based on the record in this case, this particular layoff provision can be sustained. Affirmative action layoff provisions designed to preserve the gains made through increased minority hiring are by no means uncommon in public education. Provisions substantially identical to that at issue here appear in collective bargaining agreements covering educational employees in Tacoma, Yakima, and Seattle, Washington; Tucson, Arizona; Indianapolis and South Bend, Indiana; Portland, Oregon; Colorado Springs and Pueblo, Colorado; Racine, Wisconsin; and Lansing and Grand Rapids, Michigan, among others. A modified version of this provision appears in the collective bargaining agreement covering educational employees in Madison, Wisconsin. In addition to these provisions that seek to maintain pre-layoff racial diversity, *amici* are aware of many other school districts, including districts in Alaska, Arizona, Connecticut, Colorado, Florida, Indiana and Kansas, that have collectively bargained provisions that authorize the school board to "consider" racial balance or to adhere to its affirmative action objectives in determining the order of layoff.

2. A finding by a court or outside administrative agency that a school board has engaged in unlawful discrimination is not a prerequisite for the use of race-conscious measures in the school desegregation context. A school board itself may serve as "the governmental body . . . mak[ing] findings that demonstrate the existence of illegal discrimination" in its own school system. *Fullilove v. Klutznick*, 448 U.S. 448, 498 (1980) (opinion of Powell, J.). Moreover, these findings need not be developed through any particular procedure or set forth in any particular form; they may be reflected in statements and conduct which, when viewed in their totality, constitute an acknowledgement by the school board of its past discrimination. (Part I(B)).

3. A racially diverse faculty is "an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Board of Ed.*, 395 U.S. 225, 232 (1969). (Part I(C)(1)). A school board that has found discrimination in its practices should be accorded substantial discretion in deciding what steps are appropriate to achieve a racially diverse faculty, and its actions in this regard, if reasonable, should not be disturbed by a reviewing court. A school board reasonably might conclude that an affirmative action layoff provision that is designed to preserve the progress that has been made through increased minority hiring is necessary to achieve a racially balanced faculty. (Part I(C)(2)).

In Part II of the Argument section of this brief, we consider whether the affirmative action layoff provision in this case was in fact adopted by the Jackson School Board as part of a comprehensive program designed to remedy the effects of its past educational discrimination and achieve a fully integrated school system. Inasmuch as the record that is before the Court is not fully developed with regard to the background and purpose of the provision, we draw essentially upon documents from the records of prior legal proceedings that have been lodged with the Court by respondents to demonstrate

that the answer to this question is yes. Although the Court may be precluded from relying upon the facts reflected in these documents to affirm the decision of the lower court, it can take judicial notice of their existence. If it fails to affirm on the ground urged by respondents and/or other of their supporting *amici*, it should remand so that a more complete evidentiary record can be developed for consideration of the important constitutional issues that are posed by this case in the area of school desegregation law.

ARGUMENT

I. THE 14TH AMENDMENT DOES NOT PREVENT A SCHOOL BOARD FROM VOLUNTARILY ADOPTING AN AFFIRMATIVE ACTION LAYOFF PROVISION AS PART OF A COMPREHENSIVE PROGRAM DESIGNED TO REMEDY THE EFFECTS OF ITS PAST EDUCATIONAL DISCRIMINATION AND ACHIEVE A FULLY INTEGRATED SCHOOL SYSTEM.

A. A School Board May Use Race-Conscious Measures To Remedy the Effects of Its Past Educational Discrimination and Achieve a Fully Integrated School System.

Our analysis begins with two propositions of constitutional law that are firmly established by the decisions of the Court.

First, a public agency may use race-conscious measures if necessary to promote a compelling governmental interest. *Regents of the University of California v. Bakke*, 438 U.S. 265, 307, 310-15 (1978) (opinion of Powell, J.); *id.* at 362-69 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) The relevant constitutional inquiries in this context are (1) whether the governmental interest is sufficiently compelling so as to warrant the use of racial criteria, and (2) if so, whether the particular race-conscious measure at issue is sufficiently related to the promotion of that interest. *Bakke*, 438 U.S. at 299 (opinion of Powell, J.); *Fullilove*, 448

U.S. at 480 (opinion of Burger, C.J.); *id.* at 519 (opinion of Marshall, J.). *See Dayton Board of Ed. v. Brinkman*, 433 U.S. 406, 419-20 (1977) (*Dayton I*); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*).

Second, a school board has a compelling interest in remedying the effects of its past educational discrimination and achieving a fully integrated school system. Over thirty years ago, the Court held that separate public schools for white and black children violate the 14th Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and 349 U.S. 294 (1955) (*Brown II*). Education is "a principal instrument in awakening the child to cultural values," the Court stated, and "[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 493-94. "Where a racially discriminatory school system has been found to exist, *Brown II* imposes the *duty* on local school boards to 'effectuate a transition to a racially nondiscriminatory school system.'" *Columbus Board of Ed. v. Penick*, 443 U.S. 449, 458 (1979) (emphasis added). This duty encompasses the dual responsibility of ending invidious racial discrimination and undoing its continuing effects. Justice Powell made this point in his separate opinion in *Bakke*:

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment.

438 U.S. at 307. *See also id.* at 362-63 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

Nor is there any doubt that this interest is sufficiently compelling so as to warrant the use of race-conscious

measures to promote it. Following repeated demonstrations that the transition to a unitary, nonracial system of public education in this country could not be accomplished by the adoption of race-neutral measures alone, the Court, in *Green v. County School Board*, 391 U.S. 430, 437-38 (1968), held that school boards may be *required* under the Constitution to give *affirmative consideration* to race in order to eliminate the effects of past discrimination. As the result of *Green*, and the Court's subsequent decisions, black children must be accorded the opportunity not merely to attend a formerly all-white school, but to attend a non-racial school that is not infected by past discrimination. In order to provide this opportunity, school boards may be required to use student reassignment, redistricting, zoning, and other similar race-conscious measures. *Id.* at 442. *See North Carolina Board of Ed. v. Swann*, 402 U.S. 43, 46 (1971) (*Swann II*).

In short, "the creation of unitary school systems, in which the effects of past discrimination ha[ve] been 'eliminated root and branch,' [is] a compelling social goal justifying the overt use of race." *Bakke*, 438 U.S. at 363 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). This much is not open to dispute.

B. A Finding of Past Educational Discrimination by a Court or Outside Administrative Agency Is Not a Prerequisite for a School Board To Use Race-Conscious Measures as Part of a School Desegregation Program.

A basic question that arises with regard to the proposition set forth in Section A above is whether a finding of past discrimination by a court or outside administrative agency is necessary in order for a school board to use race-conscious measures as part of a school desegregation program. Although a majority of the Court has not yet determined whether such a finding is required as a prerequisite for race-conscious action by govern-

mental bodies generally,[3] the Court effectively has resolved this question in the school desegregation context.

The decisions of the Court in school desegregation cases make it abundantly clear that a school board need *not* wait for a judicial or administrative finding of discrimination before it may act. To the contrary, the Court has established that a school board has a constitutional *duty* to remedy its own past educational discrimination, *Milliken v. Bradley*, 433 U.S. 267, 283 (1977) (*Milliken II*); *Swann v. Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1, 15 (1971) (*Swann I*), and that it may voluntarily adopt race-conscious measures to achieve this objective without violating the Fourteenth Amendment, even though no court or outside administrative agency has found a constitutional violation. As Chief Justice Burger observed for a unanimous Court in *Swann I*, where school desegregation is concerned, "[j]udicial authority enters only when local authority defaults." 402 U.S. at 16.

[3] In *Bakke*, four members of the Court concluded that the faculty of the University of California at Davis lawfully could adopt racial preferences in the selection of students without any formal findings of past discrimination, 438 U.S. at 362-64, 366 n.42, 369 (opinion of Brennan, White, Marshall, and Blackmun, JJ.), while one member of the Court concluded that such preferences were unlawful without "judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307-09 (opinion of Powell, J.). The remaining members of the Court did not reach the constitutional issues. *Id.* at 411-12, 421 (opinion of Stevens, J.).

In *Fullilove*, the majority voting to uphold preferences for minority business enterprises was composed of three members of the Court who concluded that judicial or administrative findings were not necessary as a prerequisite to congressional action, 448 U.S. at 520 n.4 (opinion of Marshall, J.), two members of the Court who were willing to uphold the congressional action without addressing the need for any formal findings, *id.* at 490-92 (opinion of Burger, C.J.), and one member who concluded that findings were required but that such findings could be inferred from "the total contemporary record of Congressional action dealing with the problems of racial discrimination against minority business enterprises," *id.* at 497-98, 503 (opinion of Powell, J.).

Consistent with this position, the Court, in *McDaniel v. Barresi*, 402 U.S. 39 (1971), reversed a state court's attempt to set aside a school board's voluntary desegregation plan that assigned students on the basis of race. Given that no court or outside administrative agency had made findings of a constitutional violation in *Barresi*, the decision can only be understood as endorsing a race-conscious remedy based solely on the school board's own assessment of its past conduct.[4] *Cf. United Jewish Organizations v. Carey*, 430 U.S. 144, 161 (1977) (upholding State's voluntary, race-conscious reapportionment plan). Further support for a school board's "authority to act in response to identified discrimination" (*Fullilove*, 448 U.S. at 498 (opinion of Powell, J.)) is found in the Court's repeated invalidation of state efforts to limit the power of school boards voluntarily to adopt race-conscious desegregation remedies. *See Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Swann II*; *McDaniel v. Barresi*.

The principle that we assert is not unresponsive to the concern expressed by Justice Powell in *Bakke* and *Fullilove* that race-conscious measures should not be upheld unless they are supported by findings of past discrimination made by a competent administrative, judicial, or legislative body.[5] Justice Powell's concern is focused on past *societal* discrimination—a subject as to which school boards admittedly possess no special competence.[6] But the question in school desegregation cases is not societal discrimination: it is rather discrimination resulting from

[4] A majority of the Court apparently adopted this view in *Bakke*. Justice Powell referred to *Barresi* as involving a "remed[y] for [a] clearly determined constitutional violation[]." 438 U.S. at 300. Justices Brennan, White, Marshall, and Blackmun described *Barresi* as a case approving race-conscious remedies "where such findings [of past discrimination] have not been made." *Id.* at 364.

[5] *Bakke*, 438 U.S. at 308-09 (opinion of Powell, J.); *Fullilove*, 448 U.S. at 497-98 (opinion of Powell, J.).

[6] *Cf. Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

the school board's own educational practices.[7] School boards not only are competent to assess such practices, but there are strong reasons why they should be allowed and, indeed, encouraged to do so.

First, as the Court repeatedly has emphasized, local control over the management and operation of schools is our most "deeply rooted" tradition in public education, *Milliken I*, 418 U.S. at 741-42; *Dayton I*, 433 U.S. at 410; *San Antonio School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *Wright v. Council of City of Emporia*, 407 U.S. 451, 469 (1972). The school board typically is the administrative body that has legal responsibility for the general operation of the school system, including the specific responsibility for ensuring that students receive the benefits of a fully desegregated education.

Second, as indicated above, the Court's opinions on the subject of school desegregation are replete with broad language imposing on school boards the affirmative *duty* to remedy their own past educational discrimination without waiting for instructions from an external authority. *See* pages 8-10, *supra*. If school boards were forbidden to use race-conscious measures until a court or outside administrative agency had made findings of past discrimination, conscientious school boards would be hamstrung in their efforts to "eliminate discrimination root and branch," and school boards that are not so conscientious would have a ready excuse to delay the transition to a fully integrated school system. *See Bakke*, 438 U.S. at 362-63 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.* at 398-99 (opinion of Marshall, J.).

Third, the Court has acknowledged the difficulties that are involved when a court or outside administrative

[7] *See Bakke*, 438 U.S. at 307 (opinion of Powell, J.) (redressing the wrongs of past discrimination in school cases is "far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.")

agency attempts to determine whether a governmental body has engaged in unlawful educational discrimination:

> Findings as to the motivations of multimembered public bodies are of necessity difficult, *cf. Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

Dayton I, 433 U.S. at 414. A conscientious school board is in a far better position than any outside agency to assess its own past actions.

For these reasons, school boards are competent to make any "findings" of past discrimination that may be needed to support the use of race-conscious measures in a school desegregation program. A school board's findings do not have to be made with the exactitude that would be expected in a judicial or administrative proceeding, or be supported by the type of "record" that would be developed in such a proceeding. *Cf. Fullilove*, 448 U.S. at 506 (opinion of Powell, J.); *id.* at 478 (opinion of Burger, C.J.); *id.* at 520 n.4; (opinion of Marshall, J.). In attempting to determine whether there has been unlawful discrimination in its own school system, a school board should not be forced to rely solely upon evidence that could be adduced at a formal trial. The practical advantages of a process of self-assessment can be realized only if a school board is able to use information received from students, teachers, parents, community groups and any other source that is likely to provide insights as to the motives or impact of the board's actions. Nor should a school board be required to articulate its findings in any particular manner or set them forth in a precise form. Given the political realities, for example, many school boards would be unwilling to declare openly that they have been guilty of unlawful educational discrimination. Indeed, one of the principal reasons why a school board

might decide to initiate a voluntary desegregation program would be to avoid precisely such a finding by a court or outside administrative agency. The conclusion that emerges is this: any requirement that a school board must make "findings" of unlawful educational discrimination as a prerequisite to voluntary action should be deemed satisfied if it reasonably can be inferred from the totality of the school board's conduct that it "had a sound basis for believing" that unlawful educational discrimination had occurred in the school system, and that either that discrimination or its effects warranted remedial measures. *Cf. Bakke*, 438 U.S. at 369-70 (opinion of Brennan, White, Marshall and Blackmun, JJ.); *Fullilove*, 448 U.S. at 502-03 (opinion of Powell, J.).

C. A Racially Diverse Faculty Is Necessary To Remedy the Effects of Past Educational Discrimination and Achieve a Fully Integrated School System. A School Board Reasonably Might Conclude that an Affirmative Action Layoff Provision Such as That at Issue Here Is Necessary To Achieve a Racially Diverse Faculty.

1. *The Importance of a Racially Diverse Faculty.*

The Court has recognized that a racially diverse faculty is "an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *U.S. v. Montgomery County Board of Ed.*, 395 U.S. at 231-32. "[R]acial allocation of faculty denies [students] equality of educational opportunity without regard to segregation of pupils." *Rogers v. Paul*, 382 U.S. 198, 200 (1965). *See also Smith v. Board of Education*, 365 F.2d 770, 782 (8th Cir. 1966) (in which then-Circuit Judge Blackmun observed that proper desegregation of students "inevitably means that some of them will be exposed to teachers of another race.").[8]

[8] Several courts have noted that the ability to identify a faculty by race is a significant indication of a school system still in the grips of segregationist policies. *See, e.g., Swann I*, 402 U.S. at 18; *United States v. School District of Omaha*, 521 F.2d 530, 538 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); *Reed v. Rhodes*, 422 F.Supp. 708, 787-88 (N.D. Ohio 1976), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Arthur v. Nyquist*, 415 F. Supp. 904, 945 (W.D.N.Y. 1976), *aff'd*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978).

Nor is there any doubt as to the purpose that is served by a racially diverse faculty. This purpose derives from the central role that teachers play in establishing the quality of education that a school system provides to its students, and faculty integration is intended for the benefit of the students—not of the minority teachers. *See Dayton Board of Ed. v. Brinkman*, 443 U.S. 526, 539-40 & n.13 (1979) (*Dayton II*); *Columbus Board of Ed. v. Penick*, 443 U.S. at 460; *Swann I*, 402 U.S. at 18-20; *Bradley v. School Board of City of Richmond*, 382 U.S. 103, 104-05 (1965); *Rogers v. Paul*, 382 U.S. at 200. As the Third Circuit explained recently in *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 905 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985):

> Schools are great instruments in teaching social policy, for students learn not only from books, but from the images and experiences that surround them. One such lesson is of a spirit of tolerance and mutual benefit, a lesson that is more difficult to absorb when schools attended by black students are taught by black teachers while schools attended by white students are taught by white teachers.[9]

[9] The reasons offered by the Third Circuit in support of a racially diverse faculty strongly echo the reasons the Court has advanced for sustaining race-conscious measures to achieve racial diversity within student populations:

> Minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," . . . while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage.

Washington v. Seattle School District No. 1, 458 U.S. at 472-73.

[continued]

The position that the courts have taken regarding faculty integration is confirmed by educational research: there is substantial empirical evidence to indicate that a racially diverse faculty is essential to effective school desegregation.[10] A school with a desegregated student population but an essentially all-white teaching staff will have more difficulty maximizing achievement of minority students and preparing them for a range of adult roles than will a school with an integrated faculty.[11] Minority students in a school of the former type frequently encounter lower faculty expectations for their academic performance, receive less attention in non-academic situations, and are subject to discriminatory behavior in terms of assignment to ability groups, grading, and disciplinary treatment.[12] For all of these rea-

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[9] [Continued]

See also Morton v. Mancari, 417 U.S. 535, 548, 554 (1974) (sustaining law that gives members of federally-recognized Indian tribes an employment preference in the Bureau of Indian Affairs, on the ground that employees of BIA have pervasive influence over tribal members, and employment of Indians by BIA furthers goal of tribal self-governance; Court makes reference to legislation enacted by Congress in 1972 "explicitly requir[ing] that Indians be given preference in Government programs for training teachers of Indian children").

[10] W. Hawley, et al., *Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies*, vol. VI, 86-87 (Vanderbilt University, 1981), (hereinafter cited as "*Vanderbilt Study*"); *Effective School Desegregation: Equity, Quality, and Feasibility*, 301 (W.D. Hawley ed. 1981); G.A. Forehand and M. Ragosta, *A Handbook for Integrated Schooling*, 11-12 (1976).

[11] *Vanderbilt Study*, vol. I, 86; M. Weinberg, *Minority Students: A Research Appraisal*, 240 (1977).

[12] *See Vanderbilt Study*, vol. I, 87-88; M. Chesler and P. Segal, *Characteristics of Negro Students Attending Previously All-White Schools in the Deep South* (1967); Coates, *White Adult Behavior Toward Black and White Children*, 43 Child Development 143 (1972); R. Mayer, et al., *The Impact of School Desegregation in a Southern City* (1974); G. Gay, *Differential Dyadic Interaction of Black and White Teachers With Black and White Pupils in Recently*

sons, there is an increased likelihood that minority students will be alienated from school if they are taught essentially by white teachers.[13]

Conversely, minority students tend to achieve higher levels of performance when they are exposed to minority teachers.[14] Minority teachers generally accord minority students more attention in non-academic settings, and

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Desegregated Social Studies Classrooms: A Function of Teacher and Pupil Ethnicity (1974); B. Brooks, A Study of 95 Children Travelling by Bus to a K-5 School as Part of the Open Enrollment Program in a Large Urban School System (1969) (Doctoral dissertation; summary on file at Library of Congress); Katz, *Some Motivational Determinants of Racial Differences in Intellectual Achievement*, 2 International Journal of Psychology 1 (1967); Johnson, Gerard, and Miller, Teacher Influences in the Desegregated Classroom, in H.B. Gerard and N. Miller, *School Desegregation* (1975). Additionally, researchers have found that the lower the proportion of minority teachers in a school, the lower the grades and college attendance rates of minority students. *See* R.L. Crain and R.E. Mahard, *The Influence of High School Racial Composition on Black College Attendance and Test Performance* (1978). The problem of disproportionate minority student suspensions has been extensively documented. *See* Arnez, *Implementation of Desegregation as a Discriminatory Process*, 47 Journal of Negro Education 28 (1978); Miller, *Student Suspensions in Boston: Derailing Desegregation*, 20 Inequality in Education 16 (1975).

[13] *Vanderbilt Study*, vol. I, 86; G. Noar, *The Teacher and Integration* (1974). In addition, white teachers tend to characterize minority students in different and more negative terms than do minority teachers. Gottlieb, *Teaching and Students: The Views of Negro and White Teachers*, 37 Sociology of Education 345 (1964); Coates, *White Adult Behavior Toward Black and White Children, supra.*

[14] *Vanderbilt Study*, vol. I, 87; G. Bridge, C. Judd and P. Moock, *The Determinants of Educational Outcomes: The Effects of Families, Peers, Teachers and Schools* (1979); R.J. Murnane, *The Impact of School Resources on the Learning of Inner City Children* (1975); Bosma, *The Role of Teachers in School Desegregation*, 15 Integrated Education 106 (1977); Katz, *Some Motivational Determinants of Racial Differences in Intellectual Achievement, supra.*

are less likely than white teachers to place minority children in lower tracks.[15] Minority teachers have substantially greater expectations for minority students' college attendance and completion.[16] Moreover, it is important that minority students be provided with role models in order to help foster positive morale and self-concepts.[17]

The presence of minority teachers in significant numbers contributes to the morale and sensitivity of white teachers, and enhances their ability to deal with the special problems of minority students. This presence also leads to a broadening and improvement of parent attitudes.[18] Finally, white as well as minority students benefit from an integrated workplace, in which they have an opportunity to interact with members of minority groups in positions of respect and authority. This interaction tends to diminish the atmosphere of racial tension fostered by a lack of understanding and leads to better race relations.[19]

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[15] System Development Corp., *Human Relations Study: Investigations of Effective Human Relations Strategies*, vol. II (1980).

[16] Beady and Hansell, *Teacher Race and Expectations for Student Achievement*, 18 American Educational Research Journal 191 (1981); R.L. Crain and R.E. Mahard, *The Influence of High School Racial Composition on Black College Attendance and Test Performance, supra.*

[17] *Vanderbilt Study*, vol. VI, 86-87; Haney, *The Effects of the Brown Decision on Black Educators*, 47 Journal of Negro Education 88 (1978); R.J. Murnane, *The Impact of School Resources on the Learning of Inner City Children, supra*; System Development Corp., *Human Relations Study, supra*; Bosma, *The Role of Teachers in School Desegregation, supra*; M. Weinberg, *The Search for Quality Integrated Education*, 192 (1983); E.E. McAdams, Relationship Between School Integration and Student Morale (1974) (Doctoral dissertation; summary on file at Library of Congress).

[18] *Vanderbilt Study*, vol. VI; Bosma, *The Role of Teachers in School Desegregation, supra.*

[19] W. Genova and H. Wallberg, *A Practitioners' Guide for Achieving Student Integration in City High Schools* (1981); System Development Corp., *Human Relations Study, supra; Vanderbilt Study*, vol. VI; G. Noar, *The Teacher and Integration, supra* at 58; National Education Assn., *School Desegregation Guidelines for Local and State Education Associations*, 12 (1980); G.A. Forehand and M. Ragosta, *A Handbook for Integrated Schooling, supra;* R.L. Crain, R.E. Mahard and R.E. Narot, *Making Desegregation Work* (1982).

2. *The Need for an Affirmative Action Layoff Provision.*

The decisions of the Court establish that a school board is to be accorded considerable discretion in formulating a plan to remedy the effects of its past educational discrimination and achieve a fully integrated school system.[20] All reasonable measures adopted by a school board toward that end should be upheld by a reviewing court.[21] Given that a racially diverse faculty is a necessary part of an overall school desegregation program, the question becomes whether a school board reasonably might conclude that an affirmative action layoff provision such as the one at issue here is necessary to achieve a racially diverse faculty. We address this question below, and demonstrate that the answer is yes.

As with other aspects of the school desegregation problem, more than simply "color-blind" decisions may be necessary to achieve a racially diverse faculty. When the faculty already contains a significant number of minority

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[20] *See Swann I*, 402 U.S. at 15-16; *Swann II*, 402 U.S. at 45; *McDaniel v. Barresi*, 402 U.S. at 42; *United States v. Montgomery County Board of Ed.*, 395 U.S. at 235 & n.6; *Green v. County School Board*, 391 U.S. at 439.

[21] *See Swann II*, 402 U.S. at 46; *Green v. County School Board*, 391 U.S. at 439; *Morgan v. O'Bryant*, 671 F.2d 23, 28 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982); *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *United States v. City of Miami*, 614 F.2d 1322, 1340 (5th Cir. 1980); *Detroit Police Officers' Association v. Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

This discretion is necessary not only because of the vital importance of local autonomy in operating the nation's schools, see p. 12, *supra*, but also because the choices that must be made in this regard have profound effects on educational policy. *See Washington v. Seattle School District No. 1*, 458 U.S. at 479-80; *United States v. Montgomery County Board of Ed.*, 395 U.S. at 235; *Swann II*, 402 U.S. at 46.

teachers, a school board may be required to assign currently employed teachers on the basis of race in order to achieve an appropriate balance throughout the school system. If minority teachers are underrepresented on the faculty as a whole,[22] however, this obviously will not suffice: to achieve the desired result, it may be necessary for a school board to engage in preferential hiring in order to increase the overall proportion of minority teachers. This Court and the lower federal courts repeatedly have held that such race-conscious assignments and hiring are lawful means for achieving a racially diverse faculty. *See Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 35 (1971); *United States v. Montgomery County Board of Ed.*; *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3rd Cir .1984), *cert. denied*, 105 S.Ct. 782 (1985); *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982). *See also Porcelli v. Titus*, 431 F.2d 1254, 1257 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (upholding affirmative action plan for hiring supervisory faculty adopted voluntarily by school board to bring proportion of minority supervisors closer to that of minority students.)[23]

If the faculty is expanding, a preferential hiring program can increase the number of minority teachers, and

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[22] Unlike *de jure* segregation in the South, which involved dual school systems with minority and non-minority faculties, segregation in many areas of the North arose without the presence of a substantial group of minority teachers. *See* HEW Office of Education and National Center for Educational Statistics, *Public Elementary and Secondary Schools in Large School Districts with Enrollment and Instructional Staff, By Race, Fall 1967* (1969); HEW Office for Civil Rights, *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group* (1968); *id.* (1970); *id.* (1972).

[23] Whether the preferential hiring plan is keyed to the percentage of minority students or to some other race-conscious goal is irrelevant from a constitutional standpoint, so long as the plan is lawfully implemented. Petitioners in this case have not challenged the affirmative action hiring practices of the Jackson School Board.

may be sufficient to achieve a racially diverse faculty. Even if the size of the faculty remains constant, the normal turnover resulting from retirements and resignations ordinarily will enable a school board to hire additional minority teachers. These hiring opportunities do not exist, however, when declining enrollment, increased costs or other reasons make it necessary to reduce the size of the teaching staff. Nor will the result of this staff reduction be simply to freeze the minority/non-minority *status quo*. The recently hired minority teachers will have less seniority than most of their white colleagues, and if the layoffs are based strictly on seniority, the progress that has been made through preferential hiring toward achieving a racially diverse faculty could be wiped out. As the First Circuit put it in *Boston Chapter NAACP v. Beecher*, 679 F.2d 965, 974-75 (1st Cir. 1982), *vacated as moot*, 461 U.S. 477 (1983), a race-conscious layoff policy may be necessary "to insure that [hiring] relief already [achieved] not be eviscerated by seniority-based layoffs." *See also Morgan v. O'Bryant*; *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981).

It is not an adequate answer to say that the absence of minority teachers will only be temporary, and that the objectives to be served by a racially diverse faculty will be realized when the laid off minority teachers are recalled. As previously noted, faculty integration is intended not for the benefit of minority teachers, but for the benefit of students. During the period of the layoffs, those students who pass through the schools will be irrevocably deprived of an essential element of a desegregated education. Moreover, teacher layoffs are not always temporary. In many school districts, they result from a steady decline in student enrollment, and it is by no means certain if or when there will be a reversal of the trend.

Not only would the layoffs of recently hired minority teachers reinstate, and perhaps perpetuate, a condition that in the school board's view prevented the effective desegregation of the school system, but it would impart

precisely the wrong message to minority students. These students are not likely to appreciate the intricate relationship between seniority and affirmative action, and well might conclude that they have been misled as to the opportunities that are available to them in a predominantly white society—that doors which are open when conditions are favorable will be closed as soon as conditions become unfavorable.

In short, hiring and layoffs are opposite sides of the same coin, and there is no principled reason why a school board's constitutional obligation to remedy the effects of its past educational discrimination and achieve a fully integrated school system should not, in appropriate circumstances, justify the use of a race-conscious layoff policy to preserve the progress that has been made through preferential hiring. There is, to be sure, an "instinctive" difference between hiring and layoffs. When layoffs are involved, the "innocent" non-minorities can be more precisely identified and the adverse impact on them more readily gauged. For non-minority employees whose seniority would protect them from layoff but for the minority retention preference, reasonable expectations have been disappointed. But as three justices of the Court observed in somewhat analogous circumstances, "[i]t is not a constitutional defect in this [policy] that it may disappoint the expectations of non-minority [employees]." *Fullilove*, 448 U.S. at 484 (opinion of Burger, C.J.).[24]

The foregoing is not meant to suggest that any affirmative action layoff policy necessarily will pass constitutional muster simply because it is designed to preserve the progress that has been made through preferential hiring. Al-

[24] The seniority-based expectations of non-minority employees would be subject to modification even if they had been hired prior to the negotiation of a lay-off provision. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778-79 (1976). In the instant case, petitioners all were hired years after the seniority system was modified to reflect the terms of the challenged affirmative action layoff provision.

though a school board may have considerable discretion in deciding how to remedy the effects of its past educational discrimination, the actions taken in this regard must be reasonable. In practical terms, this means that the beneficial nature of a particular race-conscious measure must be balanced against the possible harm to the affected parties. The Court made essentially this type of balance in *Steelworkers v. Weber*, 443 U.S. 193 (1979), which involved a Title VII challenge to a voluntary affirmative action plan implemented by Kaiser Aluminum and Chemical Corporation. The plan admitted black employees to a training program at a one-to-one rate with white employees, with the result that some black employees were admitted in preference to more senior white employees.

In sustaining the challenged plan, the *Weber* Court noted initially that it was designed to advance the purposes of Title VII, in that the employment categories involved were ones that had been traditionally segregated. The Court then identified several specific criteria as relevant to its determination that the plan was reasonable.[25] In the instant case, the lower courts applied the *Weber* analysis to the challenged affirmative action layoff provision and, based upon that analysis, concluded that it did not violate the rights of the laid off non-minority teachers under the Equal Protection Clause. Although this conclusion certainly is justified,[26] we submit that a *Weber*-type

[25] The Court stated that the plan did "not unnecessarily trammel the interests of the white employees"; did not "create an absolute bar [with respect] . . . to the white employees"; and was intended only as "a temporary measure." *Weber*, 443 U.S. at 208.

[26] Public school employment unquestionably is an area in which discrimination traditionally has been present. *See, e.g., Columbus Board of Ed. v. Penick*, 443 U.S. at 467; *Swann I*, 402 U.S. at 18; *United States v. Montgomery County Board of Ed.*, 395 U.S. at 231-32; *Rogers v. Paul*, 382 U.S. at 199; *Brown I*, 347 U.S. at 495; *Morgan v. O'Bryant*, 671 F.2d at 27; *Zaslawsky v. Board of Education*, 610 F.2d at 664; *Caulfield v. Board of Education*, 632

analysis cannot, in and of itself, be determinative as to the reasonableness of an affirmative action plan in the school desegregation context.

Weber was an employment discrimination case, in which the affirmative action plan was designed solely to increase minority participation in certain job categories and end segregated patterns of staffing. As such, the intended beneficiaries of the plan were the minority employees, and in judging its reasonableness, the Court balanced the interests of those employees against the interests of the more senior non-minority employees. An affirmative action layoff provision such as the one at issue here promotes a school board's compelling interest in remedying the effects of its past educational discrimination and achieving a fully integrated school system. The students—both minority and non-minority—are the "identifiable victims" of the past school board practices that produced a substantially white faculty, and they—not the minority teachers—are the intended beneficiaries of the affirmative action layoff

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F.2d 999, 1005-07 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Porcelli v. Titus*, 431 F.2d at 1254.

The challenged layoff provision does not unnecessarily trammel the interests of the non-minority teachers: it simply increases the chances that these teachers will be laid off during a reduction in force. Moreover, the Jackson Education Association, which is comprised predominantly of non-minority teachers, consented to the provision when it ratified the collective bargaining agreement with the School Board. Although such consent is not sufficient to validate an otherwise unlawful affirmative action provision, it does at least indicate that the non-minority teachers as a group did not consider that the provision constituted an unreasonable burden upon them.

Nor does the provision create an absolute bar to the protection of non-minority teachers. It does not categorically prohibit the layoff of minority teachers, but simply maintains the proportion of such teachers at whatever level it may be when layoffs become necessary. Accordingly, minority and non-minority teachers share the burden of the reduction in force.

Finally, the policy is temporary in nature. Inasmuch as it is contained in a collective bargaining agreement of only a few years' duration, it is subject to periodic review and reappraisal by both the School Board and the union.

provision. Their interest in—and constitutional right to—the benefits of a desegregated education significantly affects the balance made in *Weber*, and provides an even stronger argument for upholding this type of affirmative action layoff provision.[27]

Ignoring the above distinction, certain of the *amici* supporting petitioners contend that this case can be disposed of soleiy on the basis of Title VII, and that Title VII prohibits the use of this type of affirmative action layoff provision. We, of course, disagree, and by way of response simply would point out that when Congress extended coverage of Title VII to employees of public educational institutions in 1972, it was well aware of the widespread use of race-conscious measures to remedy the effects of past educational discrimination, including specifically the use of such measures to achieve faculty integration. Indeed, Congress explicitly referred to the benefit that a racially diverse faculty brings to the educational process:

> It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971). Against this backdrop, we cannot believe that Title VII was intended to preclude a school board from continuing to use

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[27] In analytical terms, this distinction reflects the fact that the frameworks for judging the reasonableness of an affirmative action plan under the Equal Protection Clause and under Title VII are different. The Equal Protection Clause requires that the affirmative action plan be directed toward achieving an important governmental interest. *Weber* requires that the plan be designed to advance the purposes of Title VII—*i.e.*, to remedy discrimination in an employment category that traditionally has been segregated.

the type of race-conscious measures that previously were available to fulfill its constitutional obligation to remedy the effects of its past educational discrimination and achieve a fully integrated school system.

II. THE AFFIRMATIVE ACTION LAYOFF PROVISION AT ISSUE IN THIS CASE WAS A REASONABLE PART OF THE SCHOOL BOARD'S COMPREHENSIVE PROGRAM TO REMEDY THE EFFECTS OF ITS PAST EDUCATIONAL DISCRIMINATION AND ACHIEVE A FULLY INTEGRATED SCHOOL SYSTEM.

As we have demonstrated in Part I above, a voluntarily adopted affirmative action layoff provision can pass constitutional muster when it is a reasonable part of a school board's comprehensive program to remedy the effects of its past educational discrimination and achieve a fully integrated school system. In order to determine whether this principle has application here, it is necessary to consider the background and purpose of the challenged affirmative action layoff provision, but the record in this case is not fully developed with regard to these matters. Unlike previous affirmative action cases that have come before the Court, no discovery was taken, no affidavits were submitted and there was no trial on the merits. Shortly after the complaint was filed, the parties filed cross-motions for summary judgment based almost entirely on the pleadings; the district court granted respondents' motion and dismissed petitioners' claim.

In an effort to provide some understanding as to the evidence that could be adduced regarding the background and purpose of the affirmative action layoff provision that is at issue, we understand that respondents intend to lodge with the Court the records from three prior legal proceedings: a 1969 administrative proceeding before the Michigan Civil Rights Commission; a 1974 federal court action, *Jackson Education Association v. Board of Education of the Jackson Public Schools*, Civil No. 4-72340 (E.D. Mich.); and a 1977 state court action,

Jackson Education Association v. Board of Education of the Jackson Public Schools, No. 77-011484CZ (Jackson County Circuit Court). The facts that appear in these records are discussed at length in respondents' brief and in the *amicus curiae* brief filed by the Jackson Education Association in support of respondents. We will not burden the Court with a reiteration of that discussion here. For present purposes, it is sufficient simply to highlight certain key points which demonstrate that the challenged affirmative action layoff provision was adopted by the Jackson School Board as part of a comprehensive program to remedy the effects of its past educational discrimination and achieve a fully integrated school system.[28]

1. Until the fall of 1972, Jackson maintained racially identifiable elementary schools. Its high schools and junior high schools had been integrated only a few years before. JEA Brief at 11-12.

2. In 1969, the Jackson NAACP filed a complaint with the Michigan Civil Rights Commission alleging widespread educational discrimination in the Jackson schools. To settle the proceeding, the School Board agreed to take a variety of actions, including the hiring of more minority teachers. That settlement was approved by the Commission. JEA Brief at 7-9.

3. Between 1969 and 1972, the School Board deliberated extensively about the question of segregation in its school system. Throughout these deliberations, the need for a racially diverse faculty was considered an integral part of the desegregation effort. One of the four key elements of the plan that ultimately was adopted by the School Board was to take affirmative measures to achieve a racial balance in the faculty "as close as possible to that of the students" and to assign a minimum

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[28] For convenience, we cite only to the pages of the Jackson Education Association's *amicus curiae* brief where the facts in question are set forth, rather than to the underlying documents that evidence these facts.

of two minority teachers to each school. This decision was made because the School Board believed that a racially diverse faculty would be educationally beneficial to minority and non-minority students alike. JEA Brief at 11-14, 19-20.

4. The school system fell far short of having enough minority teachers to place two in each school, and the School Board actively attempted to hire more minority teachers, relying heavily on recruitment at Southern colleges. JEA Brief at 13, 16, 19.

5. Almost as soon as the School Board had begun to make some progress in increasing the proportion of minority teachers on the faculty, it faced a problem of declining enrollment that would require teacher layoffs every year for the foreseeable future. The School Board concluded that laying off teachers on the basis of seniority would wipe out all of the progress it had made toward achieving a racially diverse faculty. It also concluded that such layoffs would severely hamper any future recruiting efforts at Southern colleges when the Board again was able to hire new teachers, because college graduates would not be willing to move to Jackson if they faced the prospect of being laid off shortly after relocating. JEA Brief at 16-20.

6. The layoff provision that the School Board and the Jackson Education Association included in their collective bargaining agreement does not seek artificially to maintain any particular proportion of minority teachers. It provides only that minority teachers will not be selected for layoff in a proportion greater than their current proportion on the faculty, so that the progress that has been made through minority hiring will not be wiped out by layoffs. JEA Brief at 4-6.

Although we recognize that the Court may be precluded from affirming the judgment below based on evidence that may not be in the record of this case, the documents from these earlier proceedings make it clear that this is not simply an employment discrimination case.

Accordingly, if the decision of the lower court is not affirmed on the present record, this case should be remanded so that respondents can present additional evidence to demonstrate that the challenged affirmative action layoff provision was in fact a reasonable part of a comprehensive program adopted by the Jackson School Board to remedy the effects of its past educational discrimination and achieve a fully integrated school system.

CONCLUSION

For the reasons set forth in respondents' brief, the judgment of the Sixth Circuit should be affirmed. If the judgment is not affirmed, the case should, for the reasons set forth in this brief, be remanded so that a more complete evidentiary record can be developed as to the purpose and background of the challenged affirmative action layoff provision.

Respectfully submitted,

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No. 84-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WENDY WYGANT, *et al.*,
Petitioners,

v.

JACKSON BOARD OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae, pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership

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[1] Their consents have been filed with the Clerk of the Court.

consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. In addition, nearly all of EEAC's members are subject to the affirmative action requirements under Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). Finally, many of EEAC's members are signatories to collective bargaining agreements, Title VII settlements, conciliation agreements, consent decrees and other voluntary plans or programs which provide varying forms of remedial relief or affirmative action benefitting persons or groups covered by Title VII and other federal and state equal employment statutes, regulations and orders.

Most of EEAC's member representatives are charged with corporate responsibility for compliance with federal, state and local nondiscrimination laws. As equal employment officers, they must attempt to determine not only their company's nondiscrimination and affirmative action obligations, but also the nature and extent of any remedial relief which may be necessary as well as the potential liability which these obligations might create to nonminority employees and applicants.

While EEAC members are private corporations and therefore not necessarily subject to the same constraints as public sector employers, EEAC's members are concerned about the potential impact that this Court's decision could have on the ability of employers to respond practically and responsibly to allegations that minorities or women may be underrepresented in their workforces. Whether or not such underrepresentation is caused by the employer's discrimination, it makes employers potential targets of discrimination suits filed by members of protected groups or by federal and state equal employment enforcement agencies. Such suits often are framed broadly, and the scope of the employer's potential liability may be difficult to ascertain prior to class certification hearings, discovery, trial on the merits, or post-trial remedial proceedings. Consequently, employers often face the practical necessity of exploring ways to avoid such suits, either through settlements or consent decrees, or by voluntary affirmative action to eliminate such underrepresentation.

Accordingly, employers are concerned that a decision in this case could limit unduly their flexibility in avoiding or resolving discrimination claims, particularly in light of this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). EEAC members would view with great concern any limitation on the ability of employers to adopt voluntary policies consistent with *Weber* and designed to eliminate workforce underutilization of protected group members. At the same time, it is clear from *Weber*

that, absent a finding of discrimination, race-based preferential treatment cannot be required of employers who do not wish voluntarily to adopt such policies.

Because of its interest in such issues, EEAC has participated in numerous other cases involving issues relating to the nature and scope of the equal employment and affirmative action obligations of employers. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984); *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Weber*, 443 U.S. 193; *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Because the instant case arises in the public sector context, where different standards may well apply, and because there is no firm consensus among its members regarding the appropriate scope and nature of affirmative action efforts, EEAC takes no position on the merits of the controversy before the Court. Rather, this brief is designed to highlight certain concerns of private employers and to attempt to ensure that those concerns are taken into account by the Court in deciding this case.

STATEMENT OF THE CASE

This case involves a challenge under the Equal Protection Clause of the Constitution[2] to the provisions of a collective bargaining agreement that resulted in the layoff of certain white teachers employed in the Jackson, Michigan Public Schools while minority teachers with less seniority were retained.

[2] The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Section 1.

In November 1971, 15.9 percent of the student body of the Jackson Public Schools was minority, whereas 8.3-8.5 percent of the faculty was minority (Appendix to the Petition for Certiorari at 21a). Prior to the fall of 1972, the collective bargaining agreement between the Jackson Board of Education ("the Board") and the Jackson Education Association ("JEA") provided for layoffs on the basis of seniority, that is, a "last-hired, first-fired" system. *Id.* In January 1972, a poll of public school teachers indicated that 96 percent of Jackson teachers favored a layoff system based on strict seniority. *Id.* at 22a.

In the fall of 1972, *id.*, a contract was reached between the Board and the JEA that adopted a goal of having "at least the same percentage of minority racial representation of each individual staff as is represented by the student population of the Jackson Public Schools." *Id.* In addition, the agreement altered the previous layoff provision as follows:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that *at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* (Emphasis added).

Pursuant to the new layoff provision, non-minority petitioners herein were laid off in favor of minorities with less seniority who were retained. Petition-

ers filed suit in federal court alleging that their layoffs violated the Equal Protection Clause; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*; 42 U.S.C. §§ 1981, 1983 and 1985; and various state laws.

In a decision reported at 546 F.Supp. 1195 (E.D. Mich. 1982), the district court upheld the constitutionality of the layoff provision.[3] Relying on this Court's decision in *Weber*, 443 U.S. 193, and the Sixth Circuit's decision in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the court initially held that a judicial finding of discrimination was not required before a public sector employer could adopt a voluntary affirmative action plan that gives preferential treatment to minorities. *Id.* at 1199-1200.

In addressing the layoff provision at issue, the district court observed that in order to adopt a preferential layoff plan, "there must be some evidence that minority teachers have not enjoyed the same representation on the faculty of the Jackson Public Schools as have white teachers." *Id.* at 1200. The court acknowledged that this requirement of previous underrepresentation ordinarily is determined by comparing the percentage of minorities in the employ-

[3] The court dismissed the plaintiff's Title VII counts because they had not alleged that the administrative prerequisites of Title VII had been fulfilled, *see* 42 U.S.C. § 2000e-5(f)(1), nor had they received a right-to-sue letter. 546 F.Supp. at 1203. The court also held that its finding that the layoff provisions did not violate the Constitution precluded the petitioner's claims under 42 U.S.C. §§ 1981, 1983 and 1985. *Id.* Having dismissed the petitioner's federal claims, the court declined to assert jurisdiction over the state law claims and dismissed them as well. *Id.* at 1203-04.

er's workforce with the percentage of minorities in the relevant labor market. *Id.* at 1201. Declining to adopt this comparison, however, the court stated that:

> [I]n the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of role-models. *Id.* at 1201.

Comparing the percentage of minority students (15.9 percent in 1971) to the percentage of minority faculty members (8.3-8.5 percent in 1972), the court concluded that this constituted a "substantial" and "chronic" underrepresentation sufficient to permit a voluntary affirmative action plan to protect minority teachers from the effects of layoffs. *Id.* Stating that the test for judging whether a particular affirmative action plan is constitutional is "one of reasonableness," *id.*, the court found that the layoff provision was "substantially related" to the objective of remedying past discrimination and was constitutional. *Id.* at 1201-02.

The Court of Appeals, in a decision reported at 746 F.2d 1152 (6th Cir. 1984), affirmed the district court decision, adopting in large measure the opinion of the lower court.[4] In an opinion concurring in the

[4] The petitioners did not appeal the dismissal of their Title VII claims to the Sixth Circuit. Accordingly, the Title VII claims were not before the Sixth Circuit nor are they before this Court.

result, Judge Wellford noted with regard to the comparison used by the lower court to demonstrate an underrepresentation of minority teachers that:

> Had the plaintiffs in this case presented data as to the percentage of qualified minority teachers in the relevant labor market to show that defendant Board's hiring of black teachers over a number of years had equaled that figure, I believe this court may well have been required to reverse . . . *Id.* at 1160.

In addition, Judge Wellford noted that "[u]nderrepresentation, then, of minority teachers as found by [the district court judge] based on a student minority ratio was simply improper under *Oliver* [*v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983)] and *Hazelwood* [*School District v. United States*, 433 U.S. 299 (1977)]." *Id.* at 1161.

SUMMARY OF ARGUMENT

Because this case involves a public sector employer and thus could be decided based on the requirements of the Equal Protection Clause of the Fourteenth Amendment without necessarily implicating Title VII or private employers, EEAC takes no position on the merits of the issue before the Court. Rather, this brief is intended to advise the Court of the concern of private employers that any decision in this case not limit or narrow the ability of private employers to refrain from or to engage in voluntary affirmative action that is consistent with this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

This Court clearly indicated that its decision in *Weber* applied to voluntary plans by *private* employers, and did not resolve the issue of the appropriate scope of affirmative action under the Fourteenth Amendment. A number of factors make this case an inappropriate vehicle for defining the permissible nature of affirmative action that private employers may engage in under Title VII. First, there is no Title VII issue before the Court. Second, the parties have not argued that this case provides a vehicle for any cutback on the flexibility afforded private employers by *Weber*. Finally, the lower courts relied in this case on a comparison between the percentage of minority students and minority teachers in order to find that minority teachers were underrepresented in the Jackson schools. While EEAC takes no position on whether such a comparison ever can serve as a justification for providing racial preferences in public sector employment, it urges the Court not to disturb the well-established principle that where liability is sought to be based on statistical comparisons, such comparisons must be to those persons in the relevant labor market who possess the requisite skills required by the job. *See Hazelwood School District v. United States*, 433 U.S. 299 (1977).

The flexibility provided to private employers by *Weber* has served as a means not only for employers to limit their potential liability, but also as a means of effectuating the purpo of nondiscrimination laws by enabling them to increase the job opportunities of minorities and women. Accordingly, it is submitted that the Court should take particular care to ensure that its decision under the Constitution in this public sector case does not impinge on the ability of private employers to undertake voluntary affirmative action measures where they desire to do so.

ARGUMENT

THIS COURT SHOULD EXERCISE CARE TO ENSURE THAT A DECISION IN THIS PUBLIC SECTOR CASE DOES NOT IMPINGE ON THE ABILITY OF PRIVATE EMPLOYERS TO UNDERTAKE REASONABLE AND VOLUNTARY AFFIRMATIVE ACTION WHERE THEY DESIRE TO DO SO.

A. This Case Provides An Inappropriate Vehicle To Define Or Reexamine The Proper Nature And Scope Of Voluntary Affirmative Action Measures Available To Private Employers Under *Weber*.

As noted above in the statement of interest of the amicus curiae, EEAC takes no position on the merits of the issue before the Court in the instant case. EEAC recognizes that this case, involving a public employer, could be decided strictly on the requirements of the Equal Protection Clause of the Fourteenth Amendment without necessarily having implications for Title VII or private employers. Both the district court and the court of appeals below, however, relied on and applied this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), which held that *private* employers could undertake certain voluntary affirmative action measures consistent with Title VII. Accordingly, this brief is designed to apprise the Court of the concern of private employers that any decision in this public sector case not operate to limit or narrow the ability of *private* employers to refrain from or to engage in reasonable and voluntary affirmative action that is consistent with *Weber*.

In *Weber*, 443 U.S. at 208-09, this Court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, does not prohibit private, voluntary race-conscious affirmative action efforts that were

designed to eliminate a manifest imbalance in an employer's workforce, were temporary in nature and did not unnecessarily trammel the interests of non-minority employees. In doing so, the Court expressly noted that "[s]ince the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 200. Rather, the question before this Court in *Weber* was "the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan." *Id.* (emphasis in original).

The Court reinforced in a number of instances in its opinion that its decision applied only to voluntary plans by *private* employers.[5] In holding that Congress in enacting Title VII did not intend to forbid all private voluntary race-conscious affirmative action plans, the Court noted that:

> Title VII could not have been enacted into law without substantial support from legislators in

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[5] *See, e.g., id.*, at 210 ("the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by *private* parties") (emphasis added); *id.* at 204 ("[W]e cannot agree with respondent that Congress intended to prohibit the *private* sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve") (emphasis added); *id.* at 204 (The provisions of Title VII "cannot be interpreted as an absolute prohibition against all *private*, voluntary race-conscious affirmative action efforts") (emphasis added); *id.* at 208 ("Title VII's prohibition . . . against racial discrimination does not condemn all *private*, voluntary, race-conscious affirmative action plans") (emphasis added).

both Houses who traditionally resisted federal regulation of *private* business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." *Id.* at 206 (emphasis added), *quoting* H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963), U.S. Code Cong. & Admin. News 1964, p. 2391.

Recently, in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576, 2590 (1984), this Court again cautioned that "[w]hether the City, a public employer, could have [unilaterally adopted an affirmative action program] without violating the law is an issue we need not decide." The dissent of Justice Rehnquist (joined by Justice White and the Chief Justice) from the denial of certiorari in *Bushey v. N.Y. Civil Service Comm'n*, 105 S.Ct. 803 (1985), also indicated that the ability of a public employer to adopt a voluntary affirmative action plan or program may be governed by different standards than those governing private employers. In *Bushey*, Justice Rehnquist commented on the lower court's "unexplained extension of *Weber* to allow voluntary affirmative action by State employers." *Id.* at 805. In addition, Justice Rehnquist noted that "the express reservation of the question in *Weber* [of a public employer's ability to adopt voluntary affirmative action plans] suggests that a public employer may fare differently in this regard from a private employer. . . ." *Id.*

Despite this Court's admonitions that the same standards that were applied to private employers in *Weber* might not be applicable in a public sector case, a number of lower courts have applied *Weber* to public

sector claims brought under the Constitution. In fact, both the district court and the court of appeals below relied on *Weber* in holding that the layoff provision at issue herein was constitutional. The district court stated that "*Weber* stands for the proposition that Title VII does not require a judicial finding of employer discrimination before a *private* sector employer may adopt an affirmative action plan." 546 F.Supp. at 1195 (emphasis added). Relying on the Sixth Circuit's previous decision in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the district court stated that that case "extended this particular holding of *Weber* to public sector employers and to alleged Constitutional violations." *Id.* Since there was no Title VII claim before the court because the plaintiffs had neither exhausted their administrative remedies nor received a right-to-sue letter, the court applied *Weber* to the remaining constitutional claims and held the layoff provision to be constitutional.

In *Weber*, this Court stated that "[w]e need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. While the instant case may provide an appropriate vehicle to determine the permissible scope of affirmative action plans that may be undertaken by *public* employers consistent with the Equal Protection Clause of the Fourteenth Amendment, it is submitted that this Court should expressly note that its decision does not affect the scope of permissible affirmative action that may be engaged in by *private* employers under Title VII and consistent with *Weber*.

A number of factors unique to this case make this a particularly inappropriate vehicle for spelling out

the permissible nature and breadth of affirmative action that *private* employers may engage in under Title VII. First, as noted above, there is no Title VII issue before this Court. Since *Weber* involved a *statutory* interpretation of Title VII, its precise scope for private employers should not be addressed or implicated in a case involving only equal protection claims.

Second, the parties have not argued that this case provides a vehicle for any cutback on the flexibility afforded private employers by *Weber*. Accordingly, it is submitted that this Court should take care that its decision in this case neither expressly nor impliedly operates to lessen the protection that *Weber* presently affords private employers.

An additional aspect that makes this case unique is that the lower courts relied on a comparison between the percentage of minority students and minority teachers in order to find that minority teachers were underrepresented in the Jackson schools. In doing so, the lower courts placed heavy emphasis on the importance of teachers as role models for minority students in the educational context. *See* 546 F. Supp. at 1201 and 747 F.2d at 1157. These concerns have limited relevance to private employment practices and EEAC takes no position on whether such a "role model" argument ever can serve as a justification for providing racial preferences in employment.

Whether or not this comparison satisfies constitutional standards as a justification for the use of racial preferences in the affirmative action context, the Court should not undercut the import of prior decisions where liability is sought to be based, in whole or in part, on the use of statistics. In such cases, this Court and the lower courts nearly uniformly have

required that comparisons be between the percentage of minorities (or women) in an employer's workforce and the percentage of minorities (or women) with the requisite skills in the relevant labor market. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 584-85 (1979); *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 n.13 (1977); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977); *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974); *Paxton v. United Nat. Bank*, 688 F.2d 552, 564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540-41 (5th Cir. 1982); *Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395, 401-02 (2d Cir. 1981).

In *Hazelwood*, this Court, in rejecting a similar argument that a comparison between Hazelwood's teacher workforce and its student population could establish a prima facie case under Title VII, stated that:

> There can be no doubt in light of the *Teamsters* case, that the District Court's comparison of Hazelwood's teacher workforce to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.

433 U.S. at 308 (footnote omitted.) Accordingly, in deciding the propriety of the "role model" argument in the affirmative action context, this Court should take care not to disturb the well-established principle

that where liability is sought to be based on statistical comparisons, such comparisons must be to those persons in the relevant labor market possessing the requisite skills required by the job.

B. The Flexibility That *Weber* Provides To Private Employers Should Not Be Impinged By A Decision In This Public Sector Case.

Following this Court's decision in *Weber*, a substantial number of private employers have entered into various forms of voluntary affirmative action agreements or plans. Others have continued to be equal opportunity employers without adopting employment preferences based on race or sex. Moreover, virtually all of EEAC's members would agree that private employers should not be compelled to use such preferences without their concurrence. The flexibility provided to employers by *Weber* serves a number of important purposes that are consistent with the objectives underlying Title VII. First, such voluntary plans or programs are consistent with the notion, long recognized by the courts, that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); *Weber*, 443 U.S. at 203-04; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). In addition, these voluntary plans are consistent with the principle under Title VII that employers are required to "self-examine and self-evaluate their employment practices and to eliminate, so far as possible, the last vestiges of their discriminatory practices." *Teamsters*, 431 U.S. at 364, *quoting Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

A second practical effect of *Weber* is that it has enabled employers, if they choose, to respond practically and responsibly to concerns that minorities and women may be underrepresented in their workforces. Whether or not such underrepresentation may have been caused by an employer's discrimination, it makes employers potential targets of persons protected by Title VII (and other state and federal equal employment statutes and regulations), or of federal or state equal employment enforcement agencies. Thus, employers often may be faced with the practical need to attempt to avoid such suits through the adoption and implementation of voluntary affirmative action plans.

The dilemma faced by employers in attempting to take affirmative steps to assure equal employment opportunity without unnecessarily interfering with the employment rights and opportunities of non-minority employees has been recognized by a number of courts. This dilemma was addressed by Judge Wisdom in his dissenting opinion in the Fifth Circuit decision in *Weber*, 563 F.2d at 230, where he stated that:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy

> is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay (citation omitted).

Justice Blackmun, in his concurring opinion in *Weber*, *supra*, 443 U.S. at 210, in commenting on Judge Wisdom's "tightrope" argument, acknowledged the predicament which employers and unions face:

> If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

See also Bratton v. City of Detroit, 704 F.2d 878, 884 n. 18 (6th Cir.), *vacated and remanded*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 703 (1984); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 967-68 (8th Cir. 1981).

Thus, *Weber*, until now, has served as a way for employers to avoid "walk[ing] a high tightrope without a net beneath them." It has provided a flexible means not only for employers to limit their own liability, but also as a means of effectuating the purposes of Title VII and other federal and state nondiscrimination laws, orders and regulations by enabling them to increase the job opportunities available to minorities and women. Accordingly, it is submitted that this Court should take particular care to ensure and should expressly state that its decision under the Constitution in this public sector case does not impinge on private employers' ability to undertake reasonable and voluntary affirmative action

measures. Any further definition of the appropriate nature and scope of voluntary, race-conscious affirmative action efforts that legally may be undertaken under Title VII by private employers should await future cases where the Title VII issue is presented squarely in a private sector case.

CONCLUSION

For the foregoing reasons, EEAC takes no position on the merits of this case, but respectfully submits that this Court should exercise care to ensure that any decision in this case does not impinge on the ability of private employers to undertake reasonable and voluntary affirmative action consistent with this Court's decision in *Weber*, while at the same time not compelling employers to take such action over their objection.

Respectfully submitted,

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(16)

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan and RICHARD SURBROOK, President and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee membership today includes former Attorneys General of the United States, former presidents of the American Bar Association, law school deans, and many of the nation's leading lawyers. The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The Lawyers' Committee and the ACLU strongly support the right of a local school board to seek to achieve a well-integrated faculty, whether that action is undertaken to improve the quality of education through a more diversified teaching staff, as a voluntary desegregation effort that furthers our nation's commitment to nondiscriminatory policies in education, or in fulfillment of an affirmative obligation to desegregate a school system. Inasmuch as the Jackson Board of Education acted pursuant to such goals, the Lawyers' Committee and the ACLU file this brief amici curiae in support of the Board.[1]

STATEMENT OF THE CASE

This case is before the Court in a highly unusual posture. Although the case was disposed of by the district court on cross-motions for summary judgment, no discovery was taken and no facts were adduced; instead, both the Board of Education and the teachers agreed that

[1] All parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court.

evidentiary materials presented and facts agreed to in two earlier related proceedings, *Jackson I* and *Jackson II*,[2] should be relied on by the district judge in resolving the present dispute. Such an agreement is not unusual inasmuch as the previous proceedings involved similar parties and similar issues; understandably, in such circumstances the parties did not wish to bear the expense of retrying matters that had already been tried in the earlier cases.

What *is* unusual is that the parties did not make *explicit* in the trial court which materials from *Jackson I* and *Jackson II* they wished the court to treat as undisputed matters and which, if any, they did not. Based on the parties' ambiguous representations on this issue, the district judge apparently elected to treat *all* the matters presented in *Jackson I* and *Jackson II* as properly before him in this case. No objection was raised to this approach by any party either in the district court or the court of appeals. Nonetheless, in their brief before *this* Court, the teachers (petitioners) now appear to dispute what is and is not part of the record and what is and

[2] The earlier related proceedings were *Jackson Education Association Inc. v. Board of Education of the Jackson Public Schools*, No. 4-72340 (E.D. Mich. 1976), J.A. 30, *et seq.*, and *Jackson Education Association Inc. v. Board of Education of the Jackson Public Schools*, No. 77-011484CZ (Jackson County Cir. Ct. 1979), J.A. 39 *et seq.* We refer to them here as *Jackson I* and *Jackson II*, respectively. In *Jackson I*, the Jackson teachers' union brought suit in federal court against the Board for its failure to follow the layoff clause here at issue; the Board defended primarily on the same grounds advanced by the teachers in the present case, including the contention that the layoff clause is unconstitutional. After a trial on the merits, the federal court declined to resolve any of the issues presented, but relegated the parties to the state court. J.A. 37.

In *Jackson II*, the ensuing state court proceeding, the parties agreed upon a record consisting of a stipulation of facts and set of exhibits from *Jackson I*. J.A. 41. On the basis of that record, the state court resolved the merits of all claims and held, among other things, that the layoff clause is constitutional. J.A. 53. That state court decision on the merits was never appealed.

is not agreed to as undisputed fact.[3] Thus, there are two matters this Court must resolve before reaching the constitutional question at issue: (1) what is "the record" before the Court; and (2) what are the facts in that record pertinent to the constitutional question. We address those two matters in turn.

1. *The Record*

In the district court, both parties filed summary judgment motions and briefs in which they proffered a "statement of facts" and claimed that there was no dispute between them about those facts.[4] They repeated this claim at oral argument on the motions[5] and in their briefs in the court of appeals.[6]

[3] For example, petitioners alleged below only that there had been "no finding of past employer discrimination in the hiring of teacher personnel on the part of the Jackson School Board, by a governmental agency competent to rule on such matters." Complaint ¶ 21. They did not dispute, however, the existence of findings by the Board of Education that the school district was segregated (Information Circulated to Jackson Citizens, April 10, 1972, Concerning School Integration Efforts, Plaintiffs' Exhibit 8 answer to question 7, Joint Pre-Trial Order, *Jackson I*), or the fact that the court in *Jackson II* found that the existence of disproportionately small numbers of minority teachers in the Jackson schools discriminated against minority students. J.A. 52. Nonetheless, petitioners now contend, incorrectly, that "[t]here is no violation of student rights in the Jackson School District" and no discrimination in education. Petitioners' Br. 11.

[4] *See* Plaintiffs' Motion for Summary Judgment at ¶ 3 ("[t]his case presents no genuine issue as to any material fact"); Plaintiffs' Brief in Support of Motion at 1 (stating that " 'there is no dispute as to the facts' ") ("Plaintiffs' Br."); Defendants' Motion for Summary Judgment at ¶ 5 ("there is no dispute as to the facts"); Defendants' Brief in Support of Motion for Summary Judgment at 1-6 ("Defendants' Br.").

[5] *See* Transcript of District Court Hearing of February 23, 1982 ("Feb. 23, 1982 Tr.") at 2, 5-6.

[6] Brief of Plaintiff-Appellants at 2 ("Trial was not held and facts were generally not disputed"); Brief of Defendant-Appellees at 2 ("Trial was not held and facts were generally not disputed").

The undisputed facts upon which the parties relied and the district court based its opinion were taken directly from the findings made and evidence adduced in *Jackson I* and *Jackson II*. The parties clearly assumed that the present case would be decided on the basis of its historical context as that context was established in the earlier, related proceedings. Both respondents and petitioners referred repeatedly to the factual findings and evidence in *Jackson I* and *Jackson II* in their briefs in support of their motions for summary judgment.[7] Accordingly, the district judge concluded that the entire history of this case—as that history is established in *Jackson I* and *Jackson II*—was properly before him: "The roots of this case reach nearly thirty (30) years into the past. It will be helpful, in coming to grips with the problems posed by this case, to review that past."[8]

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[7] For example, respondents' lengthy statement of facts quoted freely, and without citation, from the deposition of Superintendent Lawrence Read, which was admitted into evidence in *Jackson I*, and from the uncontroverted testimony given in *Jackson I* by Kirk Curtis, the former Executive Secretary of the Jackson County Education Association. Defendants' Br. 2, 5. Indeed, respondents specifically stated that their recitation of the facts was derived from the undisputed evidence and findings in *Jackson I* and *Jackson II*. Defendants' Br. 6. Petitioners, too, referred to the findings in the earlier proceedings, noting that the state court in *Jackson II* found that there had been societal discrimination against black teachers, Plaintiffs' Br. 2, and, at oral argument before the trial court, petitioners declined to object to the statement of facts as set forth in respondents' brief. Feb. 23, 1982 Tr. 5-6.

[8] Pet. App. 20a. Furthermore, the judge specifically noted that the "past" (as established in *Jackson I* and *Jackson II*) had been summarized in respondents' brief and was "not disputed by the plaintiffs." *Id.* Petitioners cannot now controvert those undisputed facts and may not now lodge new facts with this Court. As this Court held in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 362 n. 16 (1973), a party cannot disavow admissions made before the district court when that party "fail[ed] to controvert those admissions by affidavit" and "consistently maintained . . . that no factual matters remained unresolved." The Court therefore concluded that summary judgment was properly granted. *Id. See also United States v. Dooley*, 424 F.2d 1067 (5th Cir. 1970) (where

Even if the parties did not agree to the inclusion of the full record of *Jackson I* and *Jackson II* in this case, the district court was authorized to take judicial notice of those records and rely upon them in reaching its decision. In *Butler v. Eaton*, 141 U.S. 240 (1891), this Court took judicial notice of the record in a prior related proceeding. Federal courts have relied extensively on this decision, holding that they "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue," even if the records of those proceedings have not been offered into evidence.[9]

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appellant's counsel stated at oral argument that there was no dispute as to the facts, the appellate court construed this as a concession that the facts were not in dispute so that the trial court could properly consider entry of summary judgment); *Allison v. Mackey*, 188 F.2d 983, 984 (D.C. Cir. 1951) (trial court correctly considered admissions made in the points and authorities filed in support and opposition to a motion for summary judgment in rendering its decision); *United States Hoffman Machinery Corp. v. Richa*, 78 F. Supp. 969, 971-72 (W.D. Mo. 1948) (trial court relied upon admissions of counsel made at oral argument in deciding motion to dismiss).

[9] *St. Louis Baptist Temple v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (federal court took judicial notice of records in related state court proceeding which involved different parties, even though those records had not been offered into evidence). *Accord Nahtel Corp. v. West Virginia Pulp & Paper Co.*, 141 F.2d 1, 2 n.2 (2d Cir. 1944) (appellate court took judicial notice of the entire record of an earlier proceeding even though the parties had stipulated to only a portion of the record). *See also Landy v. F.D.I.C.*, 486 F.2d 139, 150-51 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974) (appellate court took notice of judicial proceedings occurring after the appeal was lodged); *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971), *cert. denied*, 404 U.S. 967 (1972) (appellate court took judicial notice of judicial proceedings occurring after the appeal was noticed); *Ellis v. Cates*, 178 F.2d 791, 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 964 (1950) (trial court took judicial notice of a proceeding by one of the parties in a prior related case); *Ins. Co. of N. Am. v. Nat'l Steel Service Center, Inc.*, 391 F. Supp. 512 (N.D. W. Va. 1975) (court took judicial notice of its own records of prior litigation related to the case before it); *Daley v. Sears, Roebuck & Co.*, 90 F. Supp. 562, 563 (N.D. Ohio 1950) (court took

For these reasons, although our description of the facts below relies primarily on the parties' summary judgment briefs and supporting affidavits, the record now before this Court includes all the uncontroverted evidence presented in *Jackson I* and *Jackson II*.

2. *The Facts*

Until 1953, there were no black teachers in the Jackson public schools.[10] In that year, a black woman, hired in a group of 61 new teachers, became the only black teacher on a teaching staff of 355.[11] The number of minority teachers increased slowly thereafter from one in 1953-54 to ten (1.8%) in 1960-61 to twenty-four (3.9%) in 1968-69.[12] In 1968-69, 15.2% of the students in the Jackson schools were minority students.[13] The racial composition of the individual elementary schools varied, however, between 0% and 86% minority, with four schools having no minority students and some having as few as 14% white students.[14]

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judicial notice of the record in an earlier related proceeding brought by the plaintiff). *See generally* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.11[9] (2d ed. 1985); 9 J. Wigmore, *Evidence* § 2579 (Chadbourn rev. 1981).

[10] Affidavit of Jane I. Phelps, August 11, 1982 at 1 ("Phelps Aff."). Defendants' Br. 1.

[11] Phelps Aff. 1-2. Defendants' Br. 1.

[12] Phelps Aff. 1. Defendants' Br. 1 (citing data provided by Howard E. Thompson, Director of Personnel, Jackson Public Schools, Plaintiffs' Ex. 15, Joint Pre-Trial Order, *Jackson I*). All of the exhibits to the Pre-Trial Order were admitted into evidence in *Jackson I*. *See* Transcript of District Court Proceedings of March 31, 1976 ("*Jackson I* Tr.") at 8.

[13] Phelps Aff. 1. Defendants' Br. 1.

[14] Report of Citizens' Advisory Committee, May 14, 1970, Plaintiffs' Ex. 2, Joint Pre-Trial Order, *Jackson I*. The Board of Education had redistricted the attendance zones for the high schools and junior high schools in 1963 and 1969 in order to ensure that the racial composition in each of these schools was roughly equivalent to that of the district as a whole.

Prompted in part by "[v]arious complaints" filed by the Jackson NAACP with the Michigan Human Rights Commission "alleging segregation of elementary schools as well as discriminatory treatment in staff hiring and placement," the Board initiated steps in the summer of 1969 to desegregate the elementary schools by redrawing the student attendance zones and hiring more minority teachers.[15] An *ad hoc* committee of teachers, school administrators and faculty union representatives was formed to study the Board's alternatives in achieving both of these objectives.[16] The Board received the committee's report in October 1969 and adopted as Board policy the committee's recommendations and findings.[17]

The committee's "priority recommendation" was that, within a year, the faculties of each of the school district's elementary schools include at least two minority persons.[18]

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[15] Defendants' Br. 1 (noting *inter alia* Complaint No. 6485-ED filed with the Michigan Civil Rights Commission by the Jackson NAACP on March 24, 1969).

[16] Defendants' Br. 1.

[17] Defendants' Br. 1-2. *See also* Deposition of Lawrence Read, Superintendent of Schools, May 16, 1975 at 10-11 ("Read Dep.") ("[the committee's recommendations] were the guiding principles for the Board when it went through the whole process in the next two or three years of attempting to desegregate the schools"). The Read Deposition was admitted into evidence in *Jackson I*. *Jackson I* Tr. 5.

[18] Defendants' Br. 2 (quoting Recommendations for Elementary School Redistricting, Jackson Public Schools Ad Hoc Committee, October 9, 1969, Plaintiffs' Ex. 1, Joint Pre-Trial Order, *Jackson I*) ("integrative experiences" designed to help achieve the goal of "full and complete integration" should be accomplished within the next twelve months including "an integrated staff at each elementary school with a minimum of two minority group teachers in each school"). Other recommendations included: inclusion of multi-ethnic materials in the curriculum, development of professional staff awareness of minority group problems through training and other growth experiences and increased communication with the community, and achievement of better inter-school experiences in which children of all races could interact. *Id.*

At that time, only three of the district's elementary schools had even two minority teachers, and there were so few minority teachers in the system that to implement the recommendation the Board would have had to hire forty new teachers immediately.[19] Recognizing that the recommendation, therefore, could not be implemented in a year, the Board obtained the Jackson Education Association's approval to seek minority personnel actively and to establish a goal of 15% minority faculty in each school building.[20]

The Board also adopted a policy in 1970 calling for complete integration of the school system.[21] The Jackson Board of Education and the Education Association were both committed to the goal of faculty integration as an important part of the school district's "grand plan" for

[19] Phelps Aff. 2. Defendants' Br. 2.

[20] This policy was incorporated as one clause in the 1970-72 professional negotiations agreement. Read Dep. 63-64. The 15% goal was roughly equivalent to the minority student population and would have ensured the presence of two minority teachers in each elementary school building. *See* Testimony of Kirk Curtis, Executive Director of the Jackson County Education Association, *Jackson I* Tr. 46-47 ("Curtis Testimony"). Such a goal, *i.e.*, one related to the racial composition of the student population, is consistent with principles and procedures for the integration of schools promulgated by the Michigan State Board of Education. *Guidelines for Providing Integrated Education within School Districts*, Michigan State Board of Education, June 1977 (reprinted in the Appendix to the court's opinion in *Berry v. School Dist. of Benton Harbor*, 467 F. Supp. 721, 735-50 (W.D. Mich. 1978) ("*Michigan Guidelines*") (desegregation plans should include "if necessary, affirmative action plans which would change the racial composition of staff in the district to reflect the racial composition of students").

[21] Read Dep. 15 ("December of 1970, the Board adopted . . . a very elaborate statement . . . on its commitment to the desegregation or integration of the Jackson Public Schools"). This statement was adopted pursuant to a Report of the Citizens' Advisory Committee, May 14, 1970, Plaintiffs' Ex. 2, Joint Pre-Trial Order, *Jackson I*, that found *inter alia* that "the education of black children can best be furthered by integration of the curricula and the teaching staff throughout the district." Read Dep. 14-15.

achieving a "truly integrated school system."[22] Moreover, both the Board of Education and the union agreed that Jackson had an *affirmative obligation* to implement a desegregation plan designed to overcome past discrimination against teachers and eliminate racial isolation of students in the schools.[23]

Affirmative recruiting in pursuit of these objectives increased the proportion of minority teachers employed by the Board of Education from 3.9% in 1969-70 to 8.8% in 1971-72.[24] It soon became clear, however, that teacher layoffs in 1970 and 1971 (forced by the school district's

[22] School officials determined that integration of the teaching staff particularly was "educationally sound and beneficial" and would "assist in the education of the children in the community." Read Dep. 76-77. There was "virtual unanimity" among the teachers in the union that there was a "need for black teachers" in the system and the union leadership expressed the view that "it is a great deal of help to both students and other staff in a particular school to have a mixed staff of minority teachers. . . ." Curtis Testimony, *Jackson I* Tr. 42, 56. Under state policies, faculty integration is an important aspect of school desegregation. The 1966 Joint Policy Statement of the State Board of Education and Michigan Civil Rights Commission on Equality of Educational Opportunity provides in part:

> [S]egregation of students in educational programs seriously interferes with the achievement of the equal opportunity guarantee of this State and . . . segregated schools fail to provide maximum opportunity for the full development of human resources in a democratic society . . . . [E]very effort shall be made to prevent and to eliminate segregation of children and staff on account of race or color. . . . Staff integration is a necessary objective to be considered by administrators in recruiting, assigning and promoting personnel.

Michigan Guidelines, note 20 *supra*, 467 F. Supp. at 747-748.

[23] Defendants' Br. 16 ("The defendants JPS and JEA recognized that students in the school district have a right to a single, multiracial school district. In order to obtain an education in an integrated school, it was just as necessary to have an integrated faculty as it was to have an integrated student body. Therefore, the parties adopted an affirmative action plan").

[24] Phelps Aff. 2. Defendants' Br. 3.

declining student population and generally adverse economic conditions in Jackson and in Michigan) threatened to wipe out completely even these limited gains.[25] The collective bargaining agreement then in effect generally required that the last hired be the first fired.[26] The Board and the teachers' union both recognized that, unless they found some way to assure new minority hires a measure of job security, their efforts to recruit new minority teachers would be crippled and their faculty desegregation goal unreachable.[27] Moreover, another complaint had been filed with the Michigan Human Rights Commission, there had been a "violent (racially motivated) explosion" at one of the high schools,[28] and the NAACP was prepared to file suit if a plan designed to remedy all aspects of segregation in the schools was not implemented.[29] The Board was convinced that further affirmative steps had to be taken and a lawsuit avoided.[30]

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[25] Defendants' Br. 3. *See also* Read Dep. 24 ("when you went into the meeting place with the pink-slipping, you saw a lot of black faces there. As a matter of fact, it did literally wipe out all the gain that had been made in terms of affirmative action to bring that about"); and Curtis Testimony, *Jackson I* Tr. 20 ("each year when there were layoffs well, all of the newly recruited minority staff members were swept into the layoffs every year").

[26] Defendants' Br. 3.

[27] *Id. See also* Read Dep. 69 (without layoff protections, "[e]verything else is in danger, if not destroyed"); Curtis Testimony, *Jackson I* Tr. 55-56 (I don't see how you can fulfill a goal . . . if you can't recruit them").

[28] Defendants' Br. 4 (quoting Read Dep. 36).

[29] Read Dep. 44 (the NAACP "was ready to go into Federal court and get a court order, as happened in Kalamazoo").

[30] The Board distributed a series of questions and answers to the community that explained why integration should not come only after a lawsuit:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. . . . Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.

Question 4, Information Circulated to Jackson Citizens April 10, 1972 Concerning School Integration Efforts, Plaintiffs' Ex. 8, 1-2, Joint Pre-Trial Order, *Jackson I*.

Given these circumstances, the Board and the union entered contract negotiations in 1972 determined to find a solution to the problem that seniority-based layoffs posed to fulfillment of their mutual commitment to increased hiring of black teachers.[31] Under the proposal they adopted,[32] which ultimately was incorporated in Article XII of the collective bargaining agreement,[33] teachers would still be laid off in reverse seniority order within their building or grouping, except minority teachers would not be laid off at a percentage rate greater than their percentage representation in the school system prior to layoff. Teacher certification would still be relevant in all assignments,[34] and previous teaching assignments and education might be relevant to a layoff decision in a given case.[35] Thus, despite the operation of the new layoff pro-

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[31] Read Dep. 28-39.

[32] The Board first proposed a complete freeze on minority layoffs until the goal of 15% minority staff was reached. Curtis Testimony, *Jackson I* Tr. 31. The union proposed a less drastic measure effecting a limited modification of seniority rights designed to protect the gains made in desegregating the system's teaching staff by ensuring consideration of race in layoff decisions. *Id.* at 35.

[33] Defendants' Br. 3-4. This clause has been included in all successive labor contracts between the teachers' union and the Board. J.A. 12 at n.2.

[34] Article VII A, 1972-73 Professional Negotiations Agreement, J.A. 14.

[35] Article IX of the 1972-73 professional negotiations agreement established that, in addition to seniority, a teacher's building assignment, grouping (TEAM leaders, art, music, physical education, and various special education and vocational educational subdivisions, etc.), subject, grade level, speciality type, type of teaching certification, identified majors and minors of academic study and past

tections for minority teachers, the new contract did not establish an absolute racial preference.[36] The teachers in the union ultimately ratified the agreement, including the minority layoff protections, because such protections were deemed necessary to "correct the past problems" and "without some modifications in the seniority system, we certainly weren't going to achieve the goals we were talking about before." [37]

In the spring of 1973, the Board of Education notified teachers that reductions in staff would be necessary and some teachers were laid off.[38] The layoffs were effected by following the provisions in the 1972-73 professional negotiations agreement.[39] Layoffs again were necessary in the spring of 1974,[40] but this time the Board refused to implement fully the minority layoff provisions in the agreement.[41] Instead, the Board laid off white probationary teachers but not white tenured teachers even though this caused a reduction in the number of minority teach-

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successful teaching assignments all could play a role in the determination whether to displace the teacher, and any one of the factors ultimately might control whether the teacher was laid off particularly at the middle school and high school levels. J.A. 23-24. Moreover, in certain circumstances, the bumping provisions of Article IX, J.A. 26-27, guaranteed more senior teachers the right to assume positions held by less senior teachers for which they were certified and qualified.

[36] Defendants' Br. 22.

[37] Curtis Testimony, *Jackson I* Tr. 42. Defendants' Br. 5 ("[t]he leadership explained that a staff racial mix was educationally sound and that the system needed black teachers. It was also noted that the new layoff policy was partially designed to remedy past discriminatory policies").

[38] Phelps Aff. 2. Defendants' Br. 5.

[39] *Id.*

[40] Defendants' Br. 5. *See also* Curtis Testimony, *Jackson I* Tr. 51.

[41] *Id.*

ers.[42] As a consequence, two minority teachers, who should have been retained under the layoff provision in the contract, joined the Jackson Education Association in filing *Jackson I*, the first of the three lawsuits concerning the validity of the minority layoff protections.[43] As earlier discussed, all claims ultimately were dismissed in *Jackson I*, but the constitutionality of the layoff provision was upheld by the state court in *Jackson II*.

In layoffs after *Jackson II*, the Board adhered to the terms of the collectively-bargained layoff provision, a course of conduct commanded by the state court's decision. This course of conduct ultimately led to petitioners' receipt of layoff notices in 1976 and 1981 [44] and to this lawsuit.

SUMMARY OF ARGUMENT

The Jackson Board of Education has a compelling interest in eliminating student and faculty segregation in the public schools and an equally compelling interest in providing its public school students with an integrated education in which all students have equal access to a racially diverse educational experience. The Jackson Board of Education initially sought to achieve its goal of integrating the Jackson faculty primarily through aggressive efforts to recruit new minority faculty. The record in this case shows, however, that seniority based layoffs in the early seventies threatened to "wipe out" entirely the minimal gains in minority hiring the Board had been able to make, and continued application of a rigid seniority-based layoff clause would impede significantly future recruiting efforts.

In this context, a collectively bargained contract provision that protects some newer minority teachers from lay-

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[42] Defendants' Br. 5. *See also* Curtis Testimony, *Jackson I* Tr. 52.

[43] Defendants' Br. 6.

[44] *Id.*

offs clearly was necessary to advance the Board's compelling purposes. Moreover, the layoff provision challenged in this case is carefully crafted to serve the Board's important objectives and does not infringe unnecessarily the rights of non-minority teachers. The layoff provision represents a slight modification of the existing seniority system that has been ratified consistently by the teachers' union. Race is not the sole factor that determines who will be laid off under the contract. Other factors, including an individual's teaching certification, qualifications and current assignment may enter into an individual layoff decision. Minority teachers are only protected from layoff to the extent necessary to assure the continued success of the school system's recruiting efforts. Furthermore, the layoff provision is not in force indefinitely. It has been reviewed several times since its adoption in 1972, and it is again subject to renegotiation in 1988 when the current collective bargaining agreement expires. For all these reasons, it is clear that the layoff provision challenged here is constitutional, and the judgment below should be affirmed.

Alternatively, the Court may now wish to exercise its discretion to decline further review of this case. Careful examination of the record below reveals that the question tendered by petitioners for review is not in fact presented. This case furthermore does not present a new, important issue for this Court to decide. Rather, it is clear from the record that this is a school desegregation case that concerns only questions well settled in this Court's previous decisions. In addition, there is some ambiguity regarding the content of the record now before this Court. This ambiguity may lead the Court to decide it is inappropriate to attempt to resolve any significant constitutional question through a review of this case. Finally, it appears that the lower court may have abused its discretion by deciding a constitutional question that may well have been mooted if state law claims made by petitioners had been resolved.

ARGUMENT

I. THE LOWER COURTS' DETERMINATION THAT THE SCHOOL BOARD ACTED CONSTITUTIONALLY SHOULD BE AFFIRMED

This Court appears to be divided regarding the standards against which the Board's actions in this case should be tested. Some Members of the Court would hold that, inasmuch as the layoff provision at issue classifies persons on the basis of race, the provision must be subjected to the strictest scrutiny, *i.e.*, that the provision must serve a "compelling" governmental interest and the provision must be "necessary" to the achievement of that interest.[45] Other Members of the Court would hold that where, as here, the racial classifications are "benign," the layoff provision should be tested by a less exacting standard, *i.e.*, that it serve an "important" governmental objective and be "substantially related" to the achievement of that objective.[46] The Court need not determine which of the two standards should apply here. The layoff provision at issue in this case easily meets the stricter standard. It was designed to serve not one but two compelling governmental interests, and it was necessary to achieve either of those interests.

A. The Layoff Provision was Designed by the School Board to Meet its Duty to Desegregate the Schools as well as to Improve Education in the Schools Through a More Diversified Faculty.

In order to review the constitutionality of the challenged layoff provision, the Court must look beyond the facts surrounding the layoffs of these petitioners in 1976 or 1981. Rather, as the district judge recognized, "the

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[45] *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting, joined by Rehnquist, J.); *id.* at 537 (Stevens, J., dissenting).

[46] *Bakke*, 438 U.S. at 359 (Brennan, J., joined by White, Marshall and Blackmun, J.J.); *Fullilove*, 448 U.S. at 518-19 (Marshall, J., joined by Brennan, White, and Blackmun, J.J.).

roots of this case reach nearly thirty (30) years into the past." Pet. App. 20a. And, as the judge further recognized, the only way the Board—and now this Court—may "com[e] to grips with the problems posed by this case," is to "review the past." *Id.* That past is not a flattering one to the Board, but it is one the Board has taken significant steps to correct.

The record demonstrates that until 1953 not a single black teacher was hired in the Jackson school system. Indeed, as late as 1968-69 fewer than 25 black teachers had been hired, representing only 3.9% of the total faculty of 610. Even then, these few black teachers were disproportionately assigned to predominantly black schools. Furthermore, as late as 1968-69—when the overall composition of the Jackson system's student body was approximately 15% black—there were still schools in the system that had no black students and some that had almost no white students. Given this history, it is not surprising that at about this same time the Board was faced with findings of discrimination against it by the Michigan Civil Rights Commission, threats of lawsuits to require desegregation of its schools, and racial disturbances in the schools. It is also not surprising that the Board decided it had to take some action to address this problem; indeed, it would have been irresponsible had the Board decided otherwise.

Under these circumstances, the Board decided two things: first, that it arguably had a legal obligation to desegregate the Jackson schools;[47] and second, that such desegregation, whether legally required, was a step that

[47] *See* note 30 *supra*. Whether the Board was correct in its assessment of its duty under federal law, at least one Michigan federal court has suggested that Michigan law required the Board to act affirmatively to integrate racially segregated schools even if the segregation was not caused by the school district. *Berry v. School Dist. of Benton Harbor*, 467 F. Supp. at 733-734 ("any school official who fails to remedy segregation in his district, no matter the cause of the segregation, is committing an act of discrimination in violation of . . . the Michigan Constitution").

was "educationally sound and beneficial" and necessary to assure equality of education in the schools.[48] Both of these purposes required the Board to take steps to increase the number of minority faculty in the school system,[49] and both constitute compelling governmental interests.

There can hardly be doubt at this late date that the first of the Board's purposes—taking affirmative steps to desegregate its schools and rid them of the last vestiges of racial discrimination—constitutes a compelling governmental interest. Indeed, this objective constitutes a fundamental national policy of the highest order.[50] Further, it is well settled that local school boards may "*voluntarily* adopt desegregation plans which [make] express reference to race if this [is] necessary to remedy the effects of past discrimination. *McDaniel v. Barresi*, 402 U.S. 39 (1971)."[51] Any other rule, *i.e.*, one that prohibited school boards from desegregating their schools until they were *ordered* to do so by a court, would be directly contrary to this Court's holding in *Brown II* that "[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving [such] problems . . . ." *Brown v.*

[48] *See* note 22 *supra*. The Board's determination was consistent with and presumably based in part on 1966 findings of the State Board of Education that "segregation . . . interferes with . . . the equal opportunity guarantee of this State" and fails "to provide maximum opportunity for the full development of human resources." *Michigan Guidelines*, note 20 *supra*.

[49] Desegregating faculties is a key component of school desegregation. *See United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-32 (1969) ("faculty . . . desegregation [is] a goal that we have recognized to be an important aspect of the task of achieving a public school system wholly free from racial discrimination"); *Singleton v. Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1217-18 (5th Cir. 1969) (en banc) (per curiam), *cert. denied*, 396 U.S. 1031 (1970) (faculty desegregation plan ordered as the first step in conversion to a unitary school system).

[50] *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[g]overnment has a fundamental, overriding interest in eradicating racial discrimination in education").

[51] *Bakke*, 438 U.S. at 362-63 (Brennan, J., joined by White, Marshall and Blackmun, JJ.).

Board of Education, 349 U.S. 294, 299 (1955) (emphasis supplied). It is only where "school authorities fail in their affirmative obligations" that "judicial authority may be invoked." [52]

The Board's laudable decision in this case was, therefore, to take steps to set right its own previous history before a court ordered it to do so. As the Board stated publicly:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system . . . . Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.[53]

It is true, of course, that the Board never publicly announced itself guilty of past illegal conduct; but it would be unrealistic and counterproductive to require a school board to confess illegality in order for it to be eligible to take steps necessary to improve its students' education.[54] As Justice Brennan wrote for the Court in *Weber* concerning Title VII of the Civil Rights Act of

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[52] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Any other rule would also be contrary to this Court's strong commitment to voluntary compliance with the purposes of the Fourteenth Amendment. *See W.R. Grace & Co. v. Int'l Union of United Rubber Workers*, 461 U.S. 757 (1983).

[53] *See* note 30, *supra*. This approach by the Board anticipated Justice Brennan's opinion in *Bakke*:

> [O]ur society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a *last* resort to achieve the cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

438 U.S. at 364 (emphasis supplied) (citation omitted).

[54] *Cf. United Steelworkers of Am. v. Weber*, 443 U.S. 193, 210-11 (1979) (Blackmun, J., concurring) (company that had "arguably" engaged in past discriminatory practices could legitimately take steps to remedy such practices).

1964, "it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." 443 U.S. at 204. The same may be said with even greater force of the Fourteenth Amendment: it would be a supreme irony if that Amendment—which *constitutionalized* this nation's concern over centuries of racial injustice—were read to *prohibit* a state's efforts to set right part of that injustice.

This record shows furthermore that the Board intended to serve a second compelling governmental interest—improving education in the Jackson schools through the integration and diversification of its faculty. The Court's unanimous decision in *Swann v. Charlotte-Mecklenburg Board of Education* validated the special power of school boards to adopt voluntary race-conscious educational measures:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities* . . . .

402 U.S. at 16 (emphasis supplied). The Court underscored this view in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), when it declared that "school authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable *quite apart from any constitutional requirements.*" *Id.* at 45 (emphasis supplied).[55] While these decisions deal with a school

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[55] The educational value of racial diversity in schools was also at the heart of Justice Powell's decision in *Bakke*. There he recog-

board's authority to improve education through development of *student-body* diversity, it necessarily follows, as the lower courts have held unanimously, that a school board's authority extends as well to the development of diversity in the *faculty*.[56]

These then are the two interests the Board of Education intended to serve when it took steps—including adopting the challenged layoff provision—to hire and

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nized a state university's compelling interest in achieving a racially diverse student body. 438 U.S. at 314. Such diversity is important, Justice Powell explained, as a means to promote other important societal interests, such as students' improved ability to live and work in a heterogeneous society. *Id.* at 312-13.

The latest reaffirmation of the compelling governmental interest in promoting racial and cultural diversity in public schools appeared in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). In *Seattle*, the Court held that a state initiative limiting a school board's power voluntarily to transport students to promote racial integration violated the Equal Protection Clause. In so holding, the Court specifically emphasized a school board's interest in and authority for developing diversity within a school:

> [W]hen [the children's] environment is largely shaped by members of different racial and cultural groups minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," . . . while, we may hope, teaching members of the racial majority to "live in harmony and mutual respect" with children of minority heritage.

458 U.S. at 472-73 (citations omitted).

[56] *See, e.g., Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 906 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985) (upholding a faculty desegregation plan on the grounds that "a school district is competent to choose" such a plan "to further educational goals"); *Zaslawsky v. Bd. of Educ.*, 610 F.2d 661, 664 (9th Cir. 1979) (upholding faculty integration plan voluntarily adopted by school board against challenge by white teachers); *Porcelli v. Titus*, 431 F.2d 1254, 1257 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (upholding plan for hiring a supervisory faculty adopted voluntarily by school board to bring proportion of black supervisors closer to that of black students).

maintain greater numbers of minority faculty in the school system. Since these two interests are compelling governmental purposes within the meaning of this Court's decisions, the only remaining issue is whether the particular provision that occasioned petitioners' layoffs was necessary to achieve those purposes.

B. The Steps Taken by the School Board, Including Its Agreement to the Layoff Provision, Were Reasonable and Necessary to Achieve Desegregation of the Schools and Diversification of the Faculty.

Given the Board's two purposes—desegregating its schools and diversifying its faculty in order to improve its students' education—it is unquestionable that the Board *had* to take *some steps* to recruit and maintain additional minority faculty members. As earlier discussed,[57] the school superintendent and the president of the teachers' union recognized that aggressive recruiting efforts alone would not result in an integrated faculty. Without some means for assuring new minority hirees that they would have some measure of job security, the Board would be prevented from recruiting sufficient numbers of minority teachers. Moreover, the operation of the layoff clause threatened to wipe out even the minimal gains in hiring that had been made.[58] It was these circumstances that caused the Board and the union to agree on the necessity of the layoff provision here at issue.

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[57] *See* p. 10, *supra*.

[58] *See* discussion at notes 25-27, *supra*. Petitioners contend that a seniority-based layoff would not have resulted in a substantial diminution in the percentage of minority teachers on the staff in 1981. Petitioners' Br. 37. They base this claim on a reading of the 1981 seniority list included in the Joint Appendix. J.A. 57-100. Because qualifications and certifications also enter into layoff judgments, counting the names on the 1981 list backwards does not tell this Court anything reliable about which teachers of what race would or would not have been laid off. In any event, given its purposes, it was surely within the Board's discretion to determine that *no* diminution of minority faculty was acceptable.

The approach adopted by the Board and the union is "limited and properly tailored" and its impact on petitioners is "an incidental consequence of the program, not part of its objective." *Fullilove v. Klutznick*, 448 U.S. at 484. As the Chief Justice noted in *Fullilove*, "[i]t is not a constitutional defect in [such a] program that it may disappoint the expectations of non-minority [individuals]. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.* (*quoting Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 (1976)). Several factors demonstrate the careful tailoring of the Board's actions in this case.

First, the layoff provision does not contravene vested contractual rights of the petitioners or of any other teacher.[59] This Court has expressly recognized that parties to a collective bargaining agreement may agree to "enhanc[e] the seniority status of certain employees" in order to further "public policy interests" even if no statute requires such action and even if the enhancement of some employees' seniority rights would operate to disturb the expectations of others.[60]

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[59] It is well settled that employees do not have "vested property rights" in a particular seniority system. Cooper and Sobol, *Seniority Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1605 (1969); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (approving good faith modification of seniority rights); *Cooper v. General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981) (seniority does not exist apart from the collective bargaining agreement). *See generally* Brief for Respondents at 34-41. Furthermore, the court in *Jackson II* specifically found that the layoff provisions here at issue do not conflict with any tenure rights recognized under Michigan law. J.A. 46-47.

[60] *Franks v. Bowman Transp.*, 424 U.S. at 778-79. Moreover, the Court has acknowledged that this is particularly so where, as in this case, the purpose of the modification of seniority rights is to "ameliorat[e] the effects of past racial discrimination, a national policy objective of the 'highest priority'." *Id.* at 779 (quoting *Pellicer v. Bhd. of Ry. and S.S. Clerks*, 217 F.2d 205 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955)).

Second, the fact that the Board and the teachers' union have agreed year after year to the layoff provisions at issue is an indication that the provision—the product of give and take in the collective bargaining process—has been tailored as closely as possible to meet the purpose to be achieved.[61] Nothing in the record remotely suggests that the union has not fully and fairly represented the interests of its members (which include petitioners) when it has negotiated and approved the layoff provisions. Moreover, Jackson teachers have been almost unanimous in their support of the Board's objective of increasing the numbers of minority faculty.[62]

Third, the layoff provision is not absolute and is not based on race alone. Rather, under the collective bargaining agreement, a variety of other factors, including teachers' certification, qualifications and grade assignment, may enter into a layoff decision and any of these factors may be determinative of a layoff in a given case. In addition, *all* teachers, both black and white, are subject to layoff under the terms of Article XII.[63] Minority teachers are laid off on the same terms as majority teachers, *i.e.*, in proportion to their respective percentage representations on the teaching staff.

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[61] Contracts including the challenged provision have been ratified six times since 1972 when the provision was first adopted. Brief for Respondents at 32 n.24. As this Court has recognized, seniority systems that reflect the "give and take of free collective bargaining . . . inevitably come in all shapes and sizes," and "[i]t does not behoove a court to second-guess either the process or its products." *California Brewers Ass'n v. Bryant*, 444 U.S. 596, 609 (1980).

[62] *See* note 22, *supra*. It should also be remembered that in *Jackson I* and *Jackson II* the union sued on behalf of its members to enforce the provisions here at issue.

[63] Thus, although the layoff provision accords all minority teachers a "plus," it is the combined weight of ethnicity, certification and qualifications that ultimately determines which teachers are subject to layoff under the provision. *See generally Bakke*, 438 U.S. at 315-19.

Finally, the layoff clause is narrowly tailored in that it is of limited duration and is periodically reviewed. The current collective bargaining agreement expires in 1988. If at that time the Board or the union decides that minority-teacher protections are no longer necessary to desegregate the schools or to diversify the faculty, either party is entirely free to negotiate modifications to the provisions here at issue; there is no reason to expect that they will not continue to monitor the necessity for these provisions as they have in the past.

Thus, the school board in this case, validated by the periodic agreement from the teachers' union, has taken reasonable and necessary steps to achieve government interests of paramount importance. Those steps may not have been *the only* approach that the Board and the union might have chosen to solve the very difficult problem they faced, but their approach or something like it was necessary if the school district's compelling need to recruit and maintain black teachers was to be met. Some degree of deference is due to the judgment that the Board and the union reached together on this matter. It is, after all, *the school board* that is entrusted in the first instance with the duty both to "formulate and implement educational policy"[64] and to "elucidat[e], asses[s], and solv[e]" the problem of school desegregation.[65] That is the duty the Board has met in this case.

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[64] *Swann*, 402 U.S. at 16.

[65] *Brown II*, 349 U.S. at 299. In difficult matters such as these, "[t]here is no universal answer to [such] complex problems . . . ; there is obviously no one plan that will do the job in every case." *Milliken v. Bradley*, 433 U.S. 267, 287 (1977) (quoting *Green v. County School Board*, 391 U.S. 430, 439 (1968)). In choosing the plan to do the job, therefore, at least where the plan chosen by the board is reasonable, is carefully tailored, has been consistently approved by the union, and has proved workable, this Court should be reluctant to strike it down as unconstitutional. In such circumstances, as this Court has often made clear, local school boards must be given a measure of discretion in setting the educational goals for their district's school children. *Bd. of Educ. of Island Trees v. Pico*, 457 U.S. 853, 863 (1982) (plurality opinion) (Brennan, Marshall, and Stevens, JJ.) ("Court has long recognized that local school boards have broad discretion in the management of school affairs"); *Id.* at 890 (Burger, C.J., Powell, Rehnquist, and O'Connor, JJ., dissenting) (school boards rather than judges should exercise discretion in matters of educational policy); *Id.* at 894 (Powell, J., dissenting) ("[s]tates and locally elected school boards should have responsibility for determining the educational policy of the public schools").

We urge the Court to affirm the constitutionality of its actions.

II. ALTERNATIVELY, THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

While the constitutionality of the Board's actions is clear on this record, nevertheless there are significant reasons why this Court may choose to decline review of this case: (a) the record does not raise the question presented for review in the petition for certiorari; (b) there is ambiguity as to the facts which properly may be considered in reviewing the Board's actions; and (c) the lower courts abused their discretion in deciding the constitutionality of the Board's actions because the petitioners' state-law claims may moot the constitutional issue. We briefly summarize each of these reasons below.

A. The Record Does Not Present the Question Raised in the Petition.

The question petitioners raised in their petition and have now briefed on the merits is whether "the Constitution tolerate[s] racial preferences for teacher layoffs adopted by a public employer in the absence of findings of past discrimination, based solely upon a disparity between respective percentages of minority faculty and students." For at least four reasons, that question is not presented by the record before this Court.

First, as *petitioners' complaint* in the district court alleged, the layoff provisions of Article XII were certainly not "based solely" upon a percentage disparity between minority faculty and students, but were based primarily

on two purposes: remedying past societal discrimination [66] and assuring the presence of "role models for minority students" in the school system.[67] More specifically, as respondents' brief in the district court stated,[68] "the new layoff policy was partially designed to correct past discriminatory policies" and "one of the reasons why both the School District and the association voluntarily agreed to the contractual layoff provision" was to assure "the exposure of students to [diverse] groups . . . ." [69] Hence, on no construction of this record can it fairly be said that the layoff provisions were "based *solely*" on perceived percentage disparities between minority students and faculties.

Second, as our earlier discussion demonstrates, not only were the layoffs in this case based on considerations *other* than percentage disparities between minority students and faculty, but in fact those layoffs were almost totally *unrelated* to such disparities. Pursuant to Article XII of the collective bargaining agreement—the article that triggered the layoffs at issue in this case—layoffs of more senior white teachers were authorized *only* to assure "that at no time will there be a greater percentage of minority personnel layoffs than the current percentage of minority personnel employed at the time of the layoffs." In other words, Article XII operated simply to maintain the proportion of minority faculty at whatever level it stood when the layoffs occurred.[70] Contrary to

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[66] Complaint ¶ 20.

[67] Complaint ¶ 32.

[68] As earlier discussed, the district court adopted the statement of facts from respondents' summary judgment brief and noted that those facts were not disputed by the petitioners. Pet. App. 20a.

[69] Defendants' Br. 5, 32.

[70] According to data from outside the record cited by petitioners, the percentage of minority faculty in 1980-81 when most of the disputed layoffs occurred was 13.4%, J.A. 108, and the percentage of minority students was 24.2%. J.A. 104. Thus, the percentage

the implications of the question raised by petitioners, there is no authority in the Board, and none was exercised here, to lay off teachers in order to achieve a parity between the percentage of minority faculty and students.

Third, and again contrary to the implications of the question posed by petitioners, race is *not* the sole factor used to determine layoffs. Rather, the collective bargaining agreement requires the Board to take into account such factors as curriculum needs and the staffing and educational requirements of particular schools—along with race—in making most layoff determinations, particularly at the middle school and high school levels.[71]

Finally, although the question presented asserts that the Board acted "in the absence of findings of past discrimination," the record shows that not to be so. The state court in the *Jackson II* proceeding specifically found that past societal discrimination had contributed to the underrepresentation of minority faculty in the Jackson school system and, furthermore, the Board itself determined that its past policies may well have been discriminatory.[72]

This Court may have granted certiorari believing that this case raised a new, important issue that the Court had not had an opportunity to review before, *i.e.*, whether a state employer may constitutionally lay off employees for racial reasons, solely to achieve some arbitrary racial balance in its work force, and without any indication of past discrimination. As we have shown, no such issue is raised in this case. This is a desegregation case in which a school board has taken balanced steps to desegregate and diversify its faculty to improve its students'

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rate of minority teachers maintained by the layoff provision was *substantially below* the percentage of minority students in the student body.

[71] *See* note 35 and p. 23, *supra*.

[72] *See* p. 18, *supra*.

education. This situation is one the Court has dealt with time and again, and it is one the Court has specifically declined to review anew in several recent cases.[73] That being so, dismissal of the writ is appropriate.[74]

B. The Scope of the Record is Unclear.

Although the conduct of the parties in the trial court apparently established the content of the record, this matter is not free from doubt. No specific stipulation of facts was filed by the parties in the trial court and no explicit incorporation of the *Jackson I* and *Jackson II* records occurred. Instead, both parties simply filed summary judgment briefs in which they proffered a "statement of facts" clearly drawn from matters in *Jackson I* and *Jackson II*. This procedure arguably leaves unclear which matters this Court may consider in deciding the issue raised by the case. In such circumstances, with critical ambiguity affecting resolution of a fundamental con-

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[73] *See Kromnick v. School Dist. of Philadelphia*, 739 F.2d at 905 ("[t]he integration of faculty is a means to improve the quality of education of those who have suffered the effects of racial prejudice and segregation"); *Arthur v. Nyquist*, 712 F.2d 816, 823 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 3555 (1984) (upholding layoff restrictions giving preference to minority teachers as an "equitable solution" that would allow the school children to "enjoy the benefits of a significantly . . . integrated faculty"); *Morgan v. O'Bryant*, 671 F.2d 23, 27 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982) (upholding layoff restrictions giving preference to minority teachers in order to protect the rights of the school children to an equal education).

[74] *See Ramsey v. New York*, 440 U.S. 444 (1979) (per curiam) (certiorari dismissed as improvidently granted because "it has become evident that on the record in this case it cannot be said with any degree of certainty that this question is actually presented"); *Belcher v. Stengel*, 429 U.S. 118 (1976) (per curiam) (certiorari dismissed because the question framed in the petition was not presented by the record); *McClanahan v. Morauer & Hartzel*, 404 U.S. 16 (1971) (per curiam) (same); *Needelman v. United States*, 362 U.S. 600 (1960) (per curiam) (same).

stitutional question, it is well settled that the Court should not undertake review of the question.[75]

C. The Constitutional Issue Should Not Have Been Decided.

Even if a constitutional issue which the Court wishes to review is fully and fairly presented on the record, there remains one final reason why the issue may not be appropriate for review by this Court. Petitioners, in addition to raising the constitutional issue in their complaint, also alleged numerous violations of state law and a violation of the collective bargaining agreement itself.[76] These claims were renewed by petitioners in their brief in the court of appeals.[77] Had any of these pendent state law claims been sustained by the lower courts, those claims would have obviated the need to reach the constitutional issue now presented to this Court. In such circumstances, it is well settled that the constitutional issue should not have been reached.[78]

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[75] *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) ("[i]n view of ambiguities in the record as to the issues sought to be tendered, . . . the writ of certiorari is dismissed as improvidently granted"). *See Minnick v. California Dept. of Corrections*, 452 U.S. 105, 127 (1981) ("because of significant ambiguities in the record," the writ of certiorari is dismissed); *Cowgill v. California*, 396 U.S. 371, 372 (1970) (Harlan, J., concurring) (constitutional issue dismissed "based on the inadequacy of the record for deciding the question presented"); *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947) (appeal dismissed where underlying constitutional issue not presented "in clean-cut and concrete form").

[76] Complaint ¶¶ 1, 15, 17, 18 and 19 (asserting violations of the state tenure act and a failure to "follow the layoff procedures outlined in the collective bargaining agreement").

[77] Plaintiffs-Appellants' Br. 19 (asserting violation of the Michigan Teacher Tenure Act).

[78] *See, e.g., Spector Motor Services, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

Rather, it was an abuse of discretion for the lower courts to fail to entertain the state law claims first; only if those claims did not fully resolve the matter should the constitutional issue have been considered.[79]

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment below or, alternatively, should dismiss the writ as improvidently granted.

Respectfully submitted,

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[79] *Schmidt v. Oakland Unified School Dist.*, 457 U.S. 594 (1982); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974). Alternatively, the district court might simply have relegated the parties to the state courts for resolution of both the state-law claims and the constitutional claims. We take no position on the question whether the lower court should have decided the state law claims first, or, alternatively, have decided no claims at all. Our position is simply that in no event should the constitutional issue have been reached.

Supreme Court, U.S.
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No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, *et al.*,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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QUESTIONS PRESENTED

(1) Was the denial of petitioners' motion for summary judgment an appealable final order under 28 U.S.C. § 1291?

(2) Did the courts below correctly deny petitioners' motion for summary judgment?

(3) Was petitioners' complaint properly dismissed?

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No. 84-1340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WENDY WYGANT, et al.,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF AMICUS CURIAE FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to

assist black persons to secure their constitutional rights by the prosecution of lawsuits. For many years attorneys for the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of issues regarding racial discrimination and race conscious affirmative action plans. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

The instant case, unlike previous affirmative action disputes heard by this Court, was never tried on the merits. Shortly after the complaint was filed, the parties filed cross motions for summary judgment; the district court granted respondents' motion and dismissed petitioners' federal claims. (J.A. 5). No

answer has ever been filed in this case, and no discovery was ever taken. Neither party submitted any affidavits or documentary evidence relating to the purpose of the disputed layoff clause, Article XII, or to the events leading to the adoption of Article XII. Nor did those parties adduce materials from which the Court could ascertain how many white and minority teachers might have been laid off in any given year but for Article XII. Thus the record in this case is extremely limited, and is devoid of evidence as to the background of and justifications for the disputed layoff clause, evidence of the sort which several members of the Court regarded as of decisive importance in Fullilove v. Klutznick, 448 U.S. 448 (1980), United Steelworkers of America v. Weber, 443 U.S. 93 (1979), and Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

The question presented by this appeal is whether the instant litigation, unlike Fullilove, Weber and Bakke, should be decided without any trial, and without any determination of the actual purposes, importance or impact of the race conscious plan at issue. The legal issues raised by the cross motions for summary judgment are quite dissimilar, since those two motions must be resolved on the basis of completely different assumptions regarding the as yet unlitigated factual issues. Yet a third set of issues are raised by respondents' motion, under Rule 12(b)(6), to dismiss the complaint for failure to state a claim on which relief could be granted.

SUMMARY OF ARGUMENT

Although this case was decided on cross motions for summary judgment, almost all of the potentially important facts

remain hotly contested. Both parties assert that there are no material issues of fact in dispute, but petitioners and respondents offer radically different accounts of what the purportedly undisputed facts are. Respondents insist the school board had a history of intentional racial discrimination which the challenged layoff clause, Article XII, was adopted to redress; petitioners deny the existence of any such history or remedial purpose. Respondents assert that the retention of a substantial number of minority teachers under Article XII was essential to the effective education of both minority and white students; petitioners insist Article XII had the effect of impairing the education of those students. Respondents contend that, in the absence of Article XII, layoffs would have drastically reduced the number of minority teachers in Jackson; petitioners claim the absence of

Article XII would have had little effect on the proportion of minority teachers.

This appeal does not present a record on which any of these or other disputed issues of fact can be resolved; indeed, it presents virtually no record at all. Neither party sought to offer in the district court any affidavits, documents, or other evidentiary material throwing any light on the purposes of or need for Article XII. Accordingly, the issue posed by this case in its present posture is whether the constitutionality of Article XII can be decided without any need for a trial, and without resolving any of the obvious disputes of fact regarding the purposes and impact of that disputed layoff provision.

The action of the district court in denying petitioners' motion for summary judgment is not an appealable final order. United States v. Florian, 312 U.S. 656

(1941). This Court therefore lacks jurisdiction to decide whether the denial of petitioners' motion was correct.

Petitioners, in urging that their motion for summary judgment should have been granted, rely largely on assertions of their view of the disputed facts. The Solicitor General argues that the Fourteenth Amendment requires that any race conscious affirmative action plan must (1) include an advance individualized factual determination that each beneficiary was the victim of past discrimination, and (2) provide for individualized adjustment of level of benefit for each beneficiary, based on the particular type and amount of discrimination to which that beneficiary was subject. On this view, Article XII, and virtually all federal, state, and local race conscious programs would be unconstitutional, regardless of the purpose for which they may have been

adopted, or the compelling state interest which they might serve.

This Court, however, has repeatedly approved voluntary programs adopted to redress past discrimination which contain no such individualized treatment of beneficiaries. Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975). Government agencies have traditionally been accorded wider latitude in correcting problems of past discrimination than might be appropriate in a judicial decree. Even in framing such decrees, the courts are not required to use the surgical precision demanded by the Solicitor; in school cases, for example, there is no requirement that the courts attempt the impossible task of predicting precisely which school each affected student would have attended but for past discrimination.

The complaint does not state a claim on which relief can be granted. The complaint itself expressly alleges that Article XII was adopted for a legitimate, non-invidious purpose -- the redressing of past discrimination. The legislative history of the Fourteenth Amendment makes clear that race conscious actions taken for such a purpose do not violate the Equal Protection clause.

ARGUMENT

I.

THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT IS NOT AN APPEALABLE ORDER

The action of the district court, insofar as it denied petitioners' motion for summary judgment, is not a final appealable order. United States v. Florian, 312 U.S. 656 (1941), rev'g 114 F.2d 990 (7th Cir. 1940). An order

denying summary judgment is not a final adjudication of the movant's claims, but merely defers that adjudication until after trial. Wright and Miller, Federal Practice and Procedure § 2715. For that reason the courts of appeals have consistently held that the appellate courts lack jurisdiction to review a denial of summary judgment.[1]

Petitioners' original motion contained a four word pro forma prayer for "injuctive relief"; had a request for an injunction been seriously and consistently pursued, jurisdiction on appeal would exist under 28 U.S.C. § 1292(a)(1). But petitioners did not do so. Petitioners' motion neither alleged the irreparable injury that is a prerequisite to any

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[1] See, e.g., Matthews v. IMC Mint Corp., 542 F.2d 544 (10th Cir. 1976); Hart v. Overseas Nat. Airways, Inc., 541 F.2d 386 (3d Cir. 1976); Gialde v. Time, Inc., 480 F.2d 1295 (8th Cir. 1973).

injunction, nor specified what injunctive relief they were seeking. The request for relief in petitioners' district court brief made no mention of any injunction, and petitioners did not raise the issue at oral argument in that court. The district court clearly did not understand there to be a pending request for any injunction; the court's opinion refers to no such request, and the judgment does not purport to deny any motion for an injunction. Petitioner's brief in the court of appeals neither referred to any earlier request for injunctive relief nor asked the appellate court, if it reversed, to award such relief. In this Court neither the Petition for Writ of Certiorari nor the Brief for Petitioners contain any reference to a past or present request for an injunction, and the only relief requested in petitioners' brief is limited to damages, costs, and attorneys fees. Thus

the rejection of petitioners' motion for summary judgment cannot be deemed a denial of injunctive relief, and any claim to the contrary has long ago been abandoned.

Under these circumstances, the only issue over which this Court has jurisdiction is whether the lower courts erred in dismissing petitioners' complaint, since only that dismissal, but not the rejection of petitioners' motion for summary judgment, was an appealable final order. If this Court concludes that that dismissal was erroneous, such a holding would resolve the only appealable issue in this case, and the case would have to be remanded for trial. This Court lacks jurisdiction to proceed further and decide whether petitioners' own motion for summary judgment should have been granted. Thus the sole question which is technically before this Court is not whether

Article XII is constitutional, but only whether petitioners are entitled to a trial regarding its constitutionality.

For this reason the Court is without jurisdiction to decide whether petitioners' motion for summary judgment was properly denied. We nonetheless set forth below our views on that issue.

II.

THE DISTRICT COURT PROPERLY DENIED PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Petitioners would have been entitled to summary judgment at this early stage in the litigation only if the district court could have determined that "there is no genuine issue as to any material fact" and that petitioners were "entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In acting on such a motion any doubt as to

the existence of a genuine issue of material fact must be resolved against petitioners as the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157-59 (1970).

(1) The Contentions of Petitioners

Petitioners contend, first, that the actual purpose of Article XII "is to achieve 'parity' between the constantly changing percentages of minority students and faculty." (P. Br. 22; see also id. at 10, 17-18). Petitioners can point to nothing in the record, however, suggesting that there is no "genuine issue" as to the truth of this claim; indeed, there is nothing in the record which even suggests such a purpose. Petitioners' own Complaint alleged purposes underlying Article XII which had nothing to do with "achieving 'parity'". (Complaint, ¶¶ 20, 32, 33).

Petitioners assert, in the alternative, that Article XII was not adopted to correct past acts of discrimination by the respondent school board. (P. Br. 7, 10, 30, 40). Again, however, since the record is silent as to the purpose of Article XII, the Court cannot assume that remedying such discrimination was not among the goals of that provision. Indeed, in the district court respondents expressly asserted that Article XII was adopted at least in part to "provide an effective remedy for past discrimination."[2]

Even if there was such a remedial purpose, petitioners object, it was unsupportable, since "the record below does not and cannot support any ... finding" of past discrimination. (P. Br.

[2] Defendants' Brief in Support of Its Motion for Summary Judgment, p. 15; see also id. at 5 ("the new layoff policy was partially designed to correct past discriminatory policies").

12; see also id. at 11, 35). If this case had come to this Court following a trial on the merits, the sufficiency of the record to support material contested factual findings might be of importance. But on a motion for summary judgment the burden was on the moving party, here petitioners, to demonstrate the absence of a genuine issue of fact regarding past discrimination. Petitioners, however, did not do so; respondents, far from agreeing that the board had never discriminated against blacks in the past, asserted precisely the opposite and insisted that they could prove at trial that such discrimination had occurred.[3]

Petitioners alleged in their complaint that Article XII was adopted, at least in part, because respondents believed that the presence of a substan-

[3] Defendants' Brief in Support of Its Motion for Summary Judgment, p. 35.

tial number of minority teachers was essential to providing students, particularly minority students, with an effective education. (Complaint, ¶ 32). In their briefs in this Court petitioners further contend that, as a matter of fact, neither Article XII nor the presence of minority teachers was required for the achieving that admittedly essential goal. Petitioners assert, for example, that the particular black school children attending the Jackson schools have in fact been unscarred by the nation's heritage of discrimination, are in no need of black role models on the school's staff, and would in no way suffer if there did not happen to be any black teachers at those schools. (P. Br. 37-39). As before, these factual contentions, if sustained at trial, might provide some support for petitioners' claims, but on a motion for

summary judgment the Court is required to assume that the facts are otherwise. Similarly, petitioners' objection that respondents "did not offer a shred of evidence in the courts below to support this rationale" (P. Br. 37), is simply beside the point; on a motion for summary judgment the opposing party is under no obligation to adduce evidence on any issue until and unless the moving party has done so.

Petitioners argue that, had Article XII not been in effect during the 1981-82 school year, the layoffs implemented in that year would have reduced the proportion of minority teachers only to 11%. (P. Br. 31 and n. 27). At the summary judgment hearing, however, respondents asserted precisely the opposite, contending that the impact of Article XII was far more substantial, and that without it the school system "would have ended up with

almost no minority teachers at all."[4] This factual dispute also cannot be resolved on the present record; under the collective bargaining agreement layoffs are made, not on the basis of district wide seniority, but on the basis of seniority among the teachers holding a specific position at a particular school. (J.A. 23-28). Thus a music teacher at one school might be laid off even though he or she had more seniority than a physics teacher at that school, or even a music teacher at another school. It is therefore impossible to reconstruct the impact of any particular layoff without knowing the nature and school of the positions eliminated, and the race and school of every other teacher in the system with that particular

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[4] Transcript of hearing of February 23, 1982, p. 21; see also id. at 20 ("Absent that language, we wouldn't have any minority teachers....").

specialty. None of that information is in the record.

B. The Arguments of the Department of Justice

(1) The complaint in this action alleged that one of the purposes of Article XII was to assure the retention in the Jackson school system of a substantial number of minority teachers whose presence was thought to be essential to the effective education of minority students. (Complaint, ¶ 32). The Justice Department contends that such a purpose could not sustain a race conscious measure such as Article XII, offering in support of this contention an essentially factual argument.

It is important to note at the outset the limited nature of the Justice Department's contentions. First, the Department does not suggest that the education of

public school students is inherently so unimportant that it could not provide a basis for a race conscious plan. On the contrary, the Solicitor General apparently acknowledges that providing for the effective education for all students, particularly those affected by past patterns of discrimination, is a matter of compelling importance. Education remains, as it was at the time of Brown v. Board of Education, "perhaps the most important function of state and local governments," and the impact of societal discrimination on minority students "may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. 483, 493-94 (1954). Second, the Department does not question the bona fides of the school officials and teachers' union that adopted Article XII; on the Solicitor's view those who approved that provision acted out of genuine,

albeit misguided, concern for the interests of the school children of the city of Jackson. Third, the Justice Department does not offer any general objection to the educational expertise of either the administrators or teachers in the Jackson school system. On all other matters of curriculum and staffing the Solicitor General would not presume to second guess the judgment of local officials who ordinarily bear the responsibility for assessing and meeting the educational needs of Jackson school children.

In this instance, however, it is the view of the Solicitor General that those administrators and teachers, despite their general expertise and familiarity with local circumstances, and although acting in the best of faith, have misapprehended the educational needs of Jackson school children. Local authorities may believe

that minority students in Jackson may learn more if some of their teachers are minorities,[5] but the Solicitor General asserts that they are mistaken, and objects that "no evidence for such an empirical effect was ever suggested, let alone examined and subjected to criticism and refutation" (U.S. Br. 5) (emphasis added). At the present stage of this proceeding, however, no "evidence" from respondents was called for, since petitioners adduced no affidavits or other material bearing on this factual issue.

The Solicitor also contends that, although minority teachers may well provide invaluable role models for minority students, the retention of such teachers under Article XII actually

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5 In a school system, such as Jackson, with approximately 15% minority teachers, a minority student is likely to have at most only a single minority teacher during his or her critical elementary school years.

impairs the education of minority students because Article XII operates as an object lesson in the evils of affirmative action (U.S. Br. 23). Again however, no evidentiary material was offered in the district court to compel or support this contention that Article XII has in fact adversely affected the education of minority students. For his conclusions regarding the effect of Article XII, the Solicitor relies, not on any evidence in the record regarding its impact on present and former Jackson school children, but on a 1972 book by a California economist and a 1974 article by an Illinois law professor. (U.S. Br. 23 and n.39.) Neither of these materials contains any reference to Jackson or Article XII; they offer, rather, merely general assertions about the effect of "all racial preferences" on all blacks and are based, not on any empirical evidence, but only on the

authors' philosophical views about what such preferences "are really saying." (Id.) Such materials are clearly insufficient to support a holding that there is no genuine issue of fact as to the correctness of the Solicitor's pedagogical theories.

The Solicitor General also argues that the benefits that flow from the presence of minority teachers can be achieved in other ways. It simply would not matter if layoffs eliminated all the black teachers in a school or throughout the system, he asserts; the remaining all-white faculty, the Solicitor argues, could simply offer courses on black history and encourage successful minority adults from other walks of life to visit the Jackson schools to show Jackson students the opportunities that exist elsewhere. The Solicitor General thinks it a relatively simple matter for a white

teacher to understand what it is like to grow up black in the United States, and to act in such a manner that black students will relate to him or her in the same manner that they would relate to a black teacher. The Solicitor's pedagogical theory, however, was never advanced by petitioners in the district court, and certainly does not constitute an uncontested fact upon which summary judgment could be based.

(2) The complaint in this action also alleged that Article XII was adopted to correct or compensate for societal discrimination. The Justice Department accepts this as a legitimate governmental goal, and agrees that race conscious measures can at times be used to achieve that end. But the Department argues that there is only one form of constitutionally acceptable race conscious action, a model which requires a highly individualized

assessment of the extent to which each potential minority beneficiary has suffered from discrimination in the past. We agree that the Justice Department's plan would be constitutional, but contend that this is not the only form of race conscious action permitted by the Constitution.

In order to assess the government's contention, it is essential to recognize what the Justice Department is not arguing. First, the Department does not assert that the Fourteenth Amendment forbids a state or locality from taking race conscious action to redress discrimination by third parties. In Bakke, Justice Powell asserted that the states have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination," 438 U.S. at 307, and the Solicitor General does not

argue otherwise. Thus, Jackson could certainly provide special educational assistance to minority students who moved to that city from school districts where they were the victims of discrimination in education. See Milliken v. Bradley, 433 U.S. 267 (1973). Similarly, the respondent board could provide special employment benefits for teachers who had suffered the effects of earlier discrimination in education or employment. State officials since the days of the underground railroad have been providing aid and redress for the victims of discrimination by others, and it is inconceivable that the framers of the Fourteenth Amendment intended to forbid such practices.

Second, the Solicitor General does not suggest that the injuries which a state or locality may undertake to redress are limited to those harms which flow

immediately and directly from acts of discrimination. The Solicitor recognizes, for example, that systematic discrimination against black adults may discourage or demoralize children, and that that indirect but very real impact is one which a state can and should attempt to undo. The experience of this Court and the lower courts has repeatedly demonstrated that as a practical matter the secondary and indirect effects of racial discrimination may often cause severe and enduring injuries. Rogers v. Paul, 382 U.S. 98, 200 (1965) (effect on students of faculty segregation); Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979) (effect on whites of housing discrimination against blacks).

But while the states are free to engage in race conscious action to aid the victims, direct or indirect, of its own or third party discrimination, the Solicitor

insists that such assistance may take one and only one form. Some sort of individualized consideration must be given, the Solicitor urges, to each individual who is the intended beneficiary of an affirmative action plan, to assure that he or she was in fact the victim of past discrimination, and to calculate the appropriate amount of voluntary redress possible. Once that analysis is completed, all victims of past discrimination must be treated alike. Article XII deviates from the Justice Department plan, and in the Department's view is thus defective, in three respects: first, it does not guarantee that every minority beneficiary is a victim of past third party discrimination; second, the benefits afforded to any individual by Article XII are not based on the extent of his or her particular past injuries; and third, Article XII protects only some but not all minority teachers who were the

victims of past discrimination. The Justice Department does not urge that utilization of its proposed approach would have prevented the laying off of the white teachers who are the petitioners in this case. Indeed, it is of course quite possible that under the Justice Department plan even more minority teachers would have been protected, and even more white teachers laid off.

The Justice Department's argument is insufficent for several reasons to justify the granting of summary judgment. First, this case, like the attack on the minority set-aside provision in Fullilove v. Klutznick, 448 U.S. 448 (1980), is only a facial constitutional challenge to Article XII; the petitioners do not allege that the minority beneficiaries of Article XII were not the victims of past societal discrimination, but argue that Article XII is unconstitutional regardless of the

background of the minority teachers who were benefitted by it. But if the benefits of Article XII in fact fell upon a constitutionally appropriate group of minority teachers, the failure of respondents to use the approach preferred by the United States neither affected the outcome of the disputed layoffs nor caused petitioners any injury in fact., Warth v. Seldin, 422 U.S. 490 (1975).

The primary argument advanced by the Justice Department in support of its proposed prototype of affirmative action is that this proposal resembles the type of relief which a court might provide for past discrimination on the part of the respondent school board. But this Court has repeatedly held that government authorities are free to take voluntary race conscious action that exceeded the relief which a court might order in an adversarial proceeding. Swann v.

Charlotte-Mecklenburg School District, 402 U.S. 1, 16 (1971). The minority set-aside program upheld in Fullilove v. Klutznick far exceeded in scope and type any remedy that a court might have ordered to redress past discrimination against minority contractors.

These differing approaches to court ordered and voluntary race conscious plans reflect critical distinctions between the judicial process on the one hand and the legislative and political processes on the other. Courts are particularly well equipped to examine in detail the specific circumstances of limited numbers of individual claimants, but can often look only to tradition precepts of law or equity to strike the proper balance between the interests of whites and minorities. Elected officials, on the other hand, frequently must take actions affecting such large numbers of indivi-

duals that consideration of individual claims and cases is simply impossible; executive and legislative officials often must govern by classification if they are to govern at all. Thus while the United States in this case insists that the slight degree of overinclusion or underinclusion would be intolerable, this Court has repeatedly rejected similar attacks on the over and underinclusiveness of federal and state laws, insisting that the sort of surgical precision here demanded by the Justice Department is often impossible to achieve. In both Schlesinger v. Ballard, 419 U.S. 498 (1975) and Califano v. Webster, 430 U.S. 313 (1977), this Court upheld, at the behest of the Solicitor General, statutes which provided, in order to redress past discrimination, compensatory treatment for all women; neither of those statutes required or permitted any individualized inquiry into whether

particular beneficiaries had in fact been the victims of such past discrimination.

Moreover it is incorrect to suggest that race conscious judicial decrees are or should be framed to benefit only identifiable victims of past discrimination. The lower courts have frequently found it necessary to issue such decrees in order to prevent future discrimination. Thus in cases where district judges have concluded that an employer would not obey a general injunction against employment discrimination, quota hiring or promotion orders have been required simply to end continued intentional violations of the law.[6] Race conscious orders regarding the selection of supervisory personnel[7] or

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[6] See, e.g. NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

[7] See, e.g. McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) (3 of 5 members of selection panel to be black); cf. Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) (quota hiring necessary to end racist

public employees[8] have been utilized where district courts regarded them as necessary to prevent discrimination against subordinate workers or against the public. Where an employer has been found guilty of using a non-job related employment test, and no new test has yet been framed, courts have directed that, as an interim measure, the old test may be utilized in combination with a race-conscious adjustment to eliminate the discriminatory effect of that test.[9] Even in providing

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environment of virtually all white workforce).

8 See, e.g., Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983) (police); NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982) (police and fire); Morgan v. Kerrigan, 530 F.2d 431 (1st Cir. 1976) (teachers).

9 See, e.g. Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) (interim quota hiring order necessary as "compliance relief"); Kirkland v. New York Dept. of Corrections, 628 F.2d 796 (2d Cir. 1980) (interim order adding 250 points to scores of minority applicants on non-job related test).

relief for victims of past discrimination, judges have at times found it impracticable to frame decrees affecting thousands of potential victims of classwide discrimination with the same precision that might be possible in a single tort action.[10] School desegregation orders, for example, have never attempted to identify which student would have been in which school but for the proven de jure segregation. In framing remedial decrees, federal courts act in a complex world in which it is at times impossible to precisely reconstruct the past, and must settle for doing rough justice if they are to do justice at all.

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10 Segar v. Smith, 738 F.2d 1249, 1289 n.36 (D.C. Cir. 1984) (individualized hearings not required where impracticable); Association Against Discrimination v. City of Bridgeport, 20 FEP Cases 985 (D.Conn. 1979) (where number but not identities of victim known, beneficiaries of decree to be chosen by lot among probable victims).

(3) The Solicitor urges, finally, that even if the purposes underlying Article XII are constitutionally sufficient, Article XII must nonetheless be declared unconstitutional because the agency that approved it, here a local school board, lacked the "constitutional competence" to make whatever findings or policy decisions might be required. (U.S. Br. 29.) The Solicitor does not dispute the board's practical competence to make the necessary judgments -- no state agency could be better equipped to assess the educational needs of Jackson school children, or the steps necessary to redress any past constitutional violations that may have been caused by Jackson officials, than the Jackson school board itself. Nor does the Solicitor deny that Michigan law confers the requisite authority on the board. The Solicitor asks this Court to declare Michigan law

unconstitutional insofar as it confers authority on a mere school board the power to take the same race conscious action that would be permissible if taken by some other agency.

The proposal here advanced by the Department of Justice would forbid a state agency that was in violation of the United States Constitution to take action to end that violation if only race conscious action would suffice. On this view, a school board which had initially assigned students on the basis of race could not deliberately reassign them on that basis to schools with integrated student bodies and faculties, even though such reassignments are at times constitutionally required. Swann v. Charlotte-Mecklenberg School District, 402 U.S. 1 (1971). The only constitutionally permissible course for such a school board, the Solicitor suggests, would be to continue to operate

its segregated schools, possibly subject to a freedom of choice plan, until a federal court was persuaded to intervene to direct an end to that constitutional violation. The doctrine which the Solicitor General urges be read into the Fourteenth Amendment is not a new one; it was enthusiastically embraced by school officials for two decades after Brown and bore the name "massive resistance." What was once widely condemned as recalcitrant disobedience to the decisions of this Court, the Justice Department now urges, should have been lauded as a prescient act of constitutional responsibility.

The Solicitor also proposes that agencies such as the respondent school board, which enjoy wide ranging authority under state law to redress any injuries inflicted by others on the citizens with whom it deals, should be stripped of that authority in one instance only, that

involving injuries occasioned by past racial discrimination. But this sort of selective obstruction of voluntary government action beneficial to blacks was precisely the constitutional vice condemned by this Court in Hunter v. Erickson, 393 U.S. 385 (1969). Were the state of Michigan to adopt a statute embodying the principles now advanced by the Solicitor, such a law would clearly be unconstitutional under Hunter.

Nothing in existing constitutional jurisprudence provides any guidelines for determining "constitutional competence;" the Solicitor General appears to assert that only Congress is "constitutionally competent" to take race conscious action (U.S. Br. 29-30), while Justice Powell indicated in Bakke that some state agencies would also be "constitutionally competent" to do so. 438 U.S. at 309. This disagreement is only a small indica-

tion of the enormous difficulties which this Court and the lower courts would face in assessing the "constitutional competence" of the thousands of different state and local agencies that have adopted an enormous variety of race conscious affirmative measures. This Court has in the past scrupulously refrained from restricting the authority of the states to allocate their authority among subordinate agencies and localities. Holt Civil Club v. Tuscaloosa, 439 U.S. 60 (1978). A similar degree of restraint is called for here.

II.

THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' COMPLAINT

The district court characterized its decision in this action as one upholding respondents' motion for summary judgment.

In light of the factual disputes noted above, we do not contend that summary judgment should have been granted to either party. Respondents also moved to dismiss the complaint for failure to state a claim on which relief could be granted. Rule 12(b)(6), Fed R. Civ. P. We urge that the allegations of the complaint are insufficient to state a violation of the Fourteenth Amendment.

If the complaint had alleged that Article XII was adopted in order to stigmatize white teachers, or out of an invidious racial hostility to the interests of whites, it would certainly have stated a cause of action. But petitioners' complaint made quite specific allegations concerning the origin of Article XII, asserting that that provision was adopted for the benign purposes of redressing past societal discrimination and providing a more effective education

for minority students. These purposes, of course, are entirely legitimate, and any non-race conscious provision adopted for such purposes would certainly have been unconstitutional. The question raised by respondents' motion to dismiss is whether petitioners would be entitled to relief if they were to prove that such motives underlay Article XII.

We agree with the United States that this issue should be answered, if possible, by reference to the original intent of the framers of the Fourteenth Amendment. (U.S. Br. 11-16). Every member of this Court has expressed a preference for resolving constitutional issues on the basis of the original intended meaning of the constitutional provision at issue. Had Article XII provided special layoff proection for handicapped or female teachers for the purpose of redressing past discrimination or providing role

models for disabled or female students, it would certainly have been constitutional. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); City of Cleburn v. Cleburn Living Center, Inc., 52 U.S.L.W. 5022 (1985). We urge that the Fourteenth Amendment was not adopted in order to prevent the states from taking the same sort of remedial action for blacks that is clearly permitted on behalf of less disadvantaged groups.

The views of affirmative action held by the framers of the Fourteenth Amendment have been set forth at length elsewhere,[11] and we summarize them here only briefly. Section 1 of the Fourteenth Amendment was adopted to prohibit, inter alia, what

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[11] "Affirmative Action and the Legislative History of the Fourteenth Amendment," 71 Va. L. Rev. ____ (June 1985); Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, Regents of the University of California v. Bakke, No. 76-811, pp. 10-53.

proponents described as "class legislation,"[12] the phrase used in the nineteenth century to refer to what we would today describe as intentional discrimination. The debates on Section 1 itself were fairly perfunctory, but an extremely detailed and vigorous debate regarding the meaning of "class legislation" occurred during the same Congress that framed the Fourteenth Amendment. The substance of those debates, and of the legislation ultimately approved, provide unambiguous evidence the Congress did not regard race conscious remedial action as "class legislation" prohibited by Section 1.

During the era when the Fourteenth Amendment was being framed and ratified, Congress approved seven statutes creating special preferences or programs for blacks alone. The most important of these was

[12] Cong. Globe, 39th Cong., 1st Sess., 2766 (Rep. Stevens).

the 1866 Freedmen's Bureau Act,[13] which expanded the scope of an 1865 law establishing the Bureau.[14] The 1866 Act contained five provisions expressly limited to blacks. Section 12 authorized the Bureau to establish schools throughout the south for the education of freedmen, and section 13 authorized the Bureau to provide other assistance to private associations engaged in the education of freedmen. Sections 6, 7 and 9 conferred on blacks title to certain land on which they had been settled by Union military officials. Section 1 of the 1866 Act authorized the continuation of activities authorized by the 1865 Act, which included providing "provisions, clothing, and fuel" for "destitute and suffering refugees and freedmen,"[15] and the regulation of "all

[13] 14 Stat. 173.
[14] 13 Stat. 507.
[15] 13 Stat. 507-08.

subjects relating to refugees or freedmen."[16] This language was on its face racially restrictive, since whites were covered only if they were refugees, whereas all southern blacks were included. Equally importantly, both supporters,[17] and opponents[18] of the 1866 Act correctly agreed that most of these existing programs had been and would continue to be open only to blacks.[19]

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16 13 Stat. 507.

17 Representative Eliot, the House sponsor, for example, referred only to freedmen in describing the 1866 Act. Cong. Globe, 39th Cong., 1st Sess., 514-15 (1866).

18 Id. at 544 (remarks of Rep. Ritter) (there were no white refugees), 634-35 (remarks of Rep. Ritter), App. 78 (remarks of Rep. Chanler) (bureau gives "most of its aid exclusively to the negro freedmen"); App. 83 (remarks of Rep. Chanler) (freedmen not refugees received "the special care of the bureau").

19 The general exclusion of whites is apparent from the Bureau's first report to Congress. House Exec. Doc. 11, 39th Cong., 1st Sess. (1865). Among the programs where only freedmen were among the named or intended beneficiaries were education (id. 2, 3, 12, 13), regulation

In addition to these provisions, in February, 1863, Congress chartered and authorized a grant of land to an association to aid "destitute colored women and children,"[20] no comparable provision being made for poor whites. In March of that year Congress chartered another organization "to educate and improve the moral and intellectural condition of such of the colored youth of the nation as may be placed in its care."[21] In March 1865 Congress established a bank whose depositors were to be limited to former slaves "or their descendants."[22] In 1866, Congress also adopted special legislation,

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of labor (id. 2, 12), land distribution (id. 4, 7-12), resolution of civil disputes (id. 22), and aid to orphans (id. 23). Of 28,057 individuals receiving medical assistance, only 238 were refugees. Id. 20-21.

20 12 Stat. 650.

21 12 Stat. 796.

22 13 Stat. 514.

applicable only to black soldiers and veterans, establishing a ceiling on the fees that could be charged by agents or attorneys handling claims of those servicemen for certain enlistment bonuses.[23] When that legislation apparently proved inadequate, Congress enacted a second measure providing that all bonuses owed certain black servicemen were to be paid to the commissioner of the Freedmen's Bureau, who would in turn disburse the appropriate amount to each serviceman and his agent or attorney, if any.[24] Also in 1867 Congress approved a special appropriation "for the relief of freedmen or destitute colored people in the District of Columbia."[25]

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[23] 14 Stat. 368.

[24] 15 Stat. 26-27.

[25] 15 Stat. 20.

These race conscious measures were consistently opposed as a form of racial discrimination against whites. Numerous members of Congress condemned this legislation in terms essentially identical to those of Justices Stewart and Rehnquist in their dissent in Fullilove, 448 U.S. at 522-26, insisting that race conscious action was intolerable regardless of the race of the beneficiaries or the motives of the responsible government officials. These measures were expressly attacked both by President Johnson[26] and on the floor of the House[27] and Senate[28] as "class legislation". Proponents of these bills insisted, on the other hand, that they were necessary and proper to "ameliorate

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[26] Messages and Papers of the President, viii, p. 3633 (1914).

[27] Cong. Globe, 39th Cong., 1st Sess., 2780 (Rep. LeBlonde) (1866).

[28] Cong. Globe, 40th Cong., 1st Sess., p. 79 (1867) (remarks of Sen. Grimes).

the condition" of blacks, and insisted that such benign considerations of race were necessary "to breakdown the discrimination between whites and blacks."[29]

Critics of these seven enactments voiced arguments quite similar to the theories advanced by the Solicitor General in this case. Four Senators[30] and two Representatives[31] objected that these measures were underinclusive, and unjustifiably failed to provide similar assistance for various groups of equally disadvantaged whites. Senator Howe, on the other hand, complained that the 1867 statute assisting black servicemen was overinclusive, since it did not "discriminate at all between ... those who are

[29] Cong. Globe, 39th Cong., 1st Sess., 631-32 (remarks of Rep. Moulton).

[30] Id. 297, 319, 370, 371.

[31] Cong. Globe, 38th Cong., 1st Sess., App. p. 54; Cong. Globe, 39th Cong., 1st Sess., 629.

educated and those who are not."[32] Similarly, an unsuccessful effort was made to limit the coverage of the 1865 Freedman's Bureau Act to newly freed slaves,[33] so that it would not extend to men and women who had been emancipated decades earlier, or as infants, and had long overcome any effects of that earlier status.

It is thus apparent that there were in 1866 a substantial number of Representatives and Senators who shared the Solicitor's preference for surgically precise remedial measures, or who agreed with Justice Rehnquist's view that benign considerations of race are as obnoxious as invidious considerations. But every one of these 19th century critics of affirmative action voted against approval of the

[32] Cong. Globe, 40th Cong., 1st Sess., 81.

[33] See Cong. Globe, 38th Cong., 1st Sess. 2798, 2800-01, 2971, 2973.

Fourteenth Amendment.[34] The sponsors of the Amendment, Congressman Stevens and Senator Wade, as well as its reported author, Congressman Bingham, all voted for the Freedmen's Bureau Act. The sponsors of the Act, Senator Trumbull and Congressman Eliot, voted for the Amendment; Eliot spoke at length in support of the Amendment, and Trumbull both wrote and sponsored the 1866 Civil Rights Act whose substantive provisions were the basis of section 1 of the Fourteenth Amendment. The thirty-ninth Congress, which was fully aware of the racial preferences contained in the Freedmen's Bureau Act finally approved in July, 1866, cannot conceivably have intended the constitutional amendment adopted in June, 1866, to condemn precisely such preferences. On the contrary, the supporters of the Act and the Amend-

[34] Cong. Globe, 39th Cong., 1st Sess., 3042, 3149, 3842, 3850.

ment regarded them as both consistent and complementary. No member of Congress ever intimated that he saw the least inconsistency between the racial preferences being adopted by Congress and the Equal Protection Clause of the Fourteenth Amendment.

It is thus clear that the Congress which framed the Fourteenth Amendment regarded as praiseworthy, not unfairly discriminatory, race conscious government action taken for the purpose of ameliorating the effects of past discrimination. Since petitioners' complaint asserts that it was that very purpose which was the reason for Article XII, the complaint itself alleges the existence of a constitutionally sufficient justification for Article XII. Thus, the facts alleged in the complaint, if taken as true, would not state a claim upon which relief could be granted.

The Justice Department, however, asserts that while this alleged purpose of Article XII is constitutional, such a race conscious action must be "precisely tailored" to redress the individually assessed injuries of particular victims of discrimination. But the legislative history of the Fourteenth Amendment reveals no such concern with precision. It is obvious, moreover, that 19th century race conscious measures discussed above, which the Solicitor General concedes would be consitutional if adopted by a state, could not meet any of the stringent standards that the Solicitor General now advocates. First, the Solicitor asserts that under any race conscious plan "the benefit conferred" must be "measured by the nature and extent of the prior violation" (U.S. Br. 26). But the nineteenth century race conscious measures provided the identical benefit to all

black beneficiaries, regardless of the extent to which they were victims of past discrimination. Second, the Solicitor asserts that any race conscious plan would be "fatally under inclusive" if the groups singled out for preferential treatment are "not the only groups that have been discriminated against in the country." (U.S. Br., 29). But the nineteenth century measures could not meet this test either, for they provided no benefits at all for Mexican-Americans, Chinese immigrants, Indians, or women, all of whom were subject in this era to forms of discrimination far more virulent than exist today. Third, the Solicitor asserts that in each instance the benefit conferred must "correspond to [an] identified prior wrong." (U.S. Br. 26). But the nineteenth century statutes neither identify a specific prior wrong to which they are addressed, nor contemplate

individualized consideration of the specific wrongs previously visited upon particular beneficiaries. The types of wrongs worked by slavery, for example, varied widely; some slaves were physically abused and denied any marketable skills, while others were immune from such abuse and were taught a trade. Yet all former slaves were afforded the same medical care and educational opportunities under the Freedmen's Bureau Act regardless of their particular background.

The Solicitor argues, finally, that any race conscious measure must include an individualized assessment of whether each proposed beneficiary had been the victim of past discrimination. "[I]t constitutes far too gross an over-simplification to assume that every Negro ... suffers the effects of past or present discrimination" (U.S. Br. 26-27) (emphasis added). But the Solicitor himself characterizes the

rationale underlying the race conscious measures adopted after the Civil War in terms of precisely such an assumption. "It seems safe to assume that virtually everyone aided by these enactments was a direct victim of slavery or racial oppression." (U.S. Br. 16 n.24) (Emphasis added). The thirty-ninth Congress did not contemplate individualized fact finding regarding the history of each beneficiary of its legislation, but resorted, as did respondents in the instant case, to administrable classification that it regarded as likely to reasonably encompass the intended beneficiaries.

Had Article XII been adopted by Congress in 1866, it certainly would have been constitutional. Article XII is no less tailored than the enactments which Congress did approve, and the special benefit accorded by Article XII is quite modest in comparison to those provided by

Congress a century ago. The subsequent passage of time does compel a different conclusion here. There are, of course, those who now believe that a century of de jure segregation has had few lasting effects, just as in 1866 there were men still prepared to argue that slavery had not injured blacks at all. But there are also today large numbers of responsible public officials who believe that virtually every black in the nation was a direct or indirect victim of racial oppression.

That is not, we submit, a controversy which the courts are in any way equipped to resolve. No rule of law provides a standard for analyzing the conflicting social and economic data. Legal research cannot trace the effects of past events on the lives of tens of millions of non-white Americans. The necessary understanding of the imponderables of human nature cannot be gleaned from the reading of any record

on file with this Court. The resolution of the dispute between the Jackson Board of Education and those who object to Article XII must be left to the electoral and collective bargaining process.

Every party to this litigation looks forward to a time when racial discrimination, like the abuses of George III, will be an historical curiosity about which our children will learn only in history classes. But from the halls of Congress to the offices of the Jackson school board, public officials all across the nation believe that that happy day is far from at hand, and that measures such as Article XII remain essential; it is not for this Court to say otherwise.

CONCLUSION

For the above reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, *et al.*,

Petitioners,

VS.

JACKSON BOARD OF EDUCATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Is a collectively bargained layoff provision which does not immunize minority employees from layoff but rather corrects the disparate impact of strict seniority a racial preference?

2. Does the Fourteenth Amendment require public employers to adhere to a last-hired, first-fired system for selecting employees for layoff?

3. Does the Fourteenth Amendment permit a union and public employer voluntarily to adopt a collective bargaining agreement which requires racially proportional layoffs

where, absent such a provision, layoffs could be expected to have a substantial disparate impact on minority employees?

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No. 84-1340
IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WENDY WYGANT, et al.,

Petitioners,

vs.

JACKSON BOARD OF EDUCATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

Petitioners and respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure the civil rights of Hispanics living in the United States, through litigation and education. MALDEF believes that the Fourteenth Amendment should and must apply with equal force to members of all racial and ethnic groups. MALDEF also believes, however, that public and private employers are permitted under the Fourteenth Amendment to take reasonable voluntary measures to correct historical underrepresentation of racial and ethnic minorities in the workforce. In support of these principles and goals, MALDEF

has participated as amicus curiae and as counsel of record in numerous cases before the Court. Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S.Ct. 2576 (1984); Fullilove v. Klutznick, 448 U.S. 448 (1980); Bryant v. California Brewers Ass'n., 444 U.S. 598 (1980); United Steelworkers of America v. Weber, 443 U.S. 193 (1969); Chicano Police Officers Ass'n. v. Stover, 426 U.S. 944 (1976), 624 F.2d 127 (10th Cir. 1980); Rodriguez v. East Texas Motor Freight Sys., Inc., 431 U.S. 395 (1977).

SUMMARY OF ARGUMENT

The Fourteenth Amendment does not require employers and unions to adopt a strict last-hired, first-fired

seniority system for layoff. An employer could constitutionally decide to lay teachers off by lot.

Article XII, although race conscious, does not create a preference based on race. It achieves the same result in racial terms as selecting employees for layoff by lot. It does not immunize minorities from layoff, nor does it require that minority teachers be laid off slower than non-minority teachers.

Article XII is a constitutional means of correcting the disparate impact of a layoff on the School District's minority employees. The record establishes that minority teachers in the Jackson School District have

significantly less seniority than non-minority teachers. A layoff based strictly on seniority would have a severe disparate impact on minority teachers. The means adopted to correct that disparate impact are constitutional. Because seniority is not a measure of individual worth, adjustments to a seniority system to ameliorate a layoff's disparate impact on minorities does not suggest that minority teachers lack the ability to succeed on their own.

One of the fundamental purposes of Title VII of the Civil Rights Act of 1964 is to correct employment practices which have a disparate impact on minorities but cannot be justified by business necessity. Article XII achieves this purpose. The immunity in

Section 703(h) of Title VII for bona fide seniority systems does not prevent a union and employer from voluntarily agreeing through collective bargaining to modify a seniority system to correct its disparate impact on minorities. The rationale behind Section 703(h) -- to accord deference to the results of collective bargaining -- and the underlying policy of Title VII to eliminate employment practices with disparate impacts on minorities are both served by allowing implementation of Article XII.

STATEMENT OF THE CASE

Although MALDEF generally concurs in the Statement of the Case in Respondents' Brief, MALDEF believes that its emphasis on this case as a school

desegregation case is somewhat misplaced. This case involves a more general problem experienced by many public and private employers. Whether as a result of efforts to correct past discrimination in the workplace, or as a result of changes over time in the racial and ethnic makeup of the employer's workforce or the available labor market, many public and private employers find that their minority employees on the whole have significantly less seniority than their non-minority employees. When such an employer faces a layoff, application of a strict last-hired, first-fired seniority system for selecting employees for layoff often has a significant disparate impact on minority employees and substantially reduces the percentage of minorities in the employer's workforce.

The fundamental issue presented by this case is whether, when a public employer is involved, the Fourteenth Amendment permits the employer and union to take voluntary steps to correct the disparate impact of a layoff on minority employees.

The Jackson School District is a good example of this problem. From 1950 to 1980, the minority population of Jackson County approximately doubled from 4.7 percent to 9.2 percent.1/ The

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1/ United States Department of Commerce, Census of Population: 1950, Vol. II, Characteristics of the Population, Part 22 Michigan, p. 22-46 (Table 12) (showing 4.7% nonwhite population); id. 1980 Census of Population, Michigan STF 3A (showing 9.212% minority population). This Court may take judicial notice of census figures. Rose v. Mitchell, 443 U.S. 547, 571 n.11 (1979); Castaneda v. Partida, 430 U.S. 482, 486 n.6 (1977); Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954).

percentage of minority teachers in the Jackson School District also grew. In 1953 there were no black teachers. By 1961, 1.8 percent of the faculty was minority. By 1968-69, minority faculty constituted 3.9 percent of the total teaching staff. By 1971-72, the period when Article XII was added to the collective bargaining agreement, minority faculty members had increased to approximately 8 percent.2/ By 1981, the time of the layoffs giving rise to the present action, minority teachers represented 13.1 percent of the faculty.3/

2/ Pet. App. 30a.

3/ J.A. 57-100 (68 of 518 teachers on 1981 seniority list are minority).

The record also indicates that minorities were historically underrepresented as teachers in the Jackson School District and that this underrepresentation was the result of discriminatory employment practices. In 1970-71, for example, minority teachers represented only 6.1 percent of the teachers in the Jackson School District,[4/] even though neighboring Wayne County had 21.6 percent minority teachers[5/] and the

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4/ Pet. Lodging, 56-62; Michigan Department of Education, Racial Ethnic Census for 1970-1971, Jackson Public Schools.

5/ Department of Commerce, Census of Population: 1970, Characteristics of the Population for Michigan ("1970 Census"), Tables 122, 127 & 132, at pp. 564, 587 & 602.

Ann-Arbor/Detroit Combined Standard Metropolitan Statistical Area from which teachers could easily have been recruited had 12.5 percent minority teachers.[6/] Discriminatory practices included the assignment of black teachers to virtually all-black schools.[7/]

Because minorities were historically underrepresented as teachers

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6/ 1970 Census, note 5 supra, Tables 86, 93 & 99, at pp. 331, 387 & 435.

7/ The preliminary investigatory report dated June 16, 1969, prepared by the Michigan Civil Rights Commission in response to Complaint No. 6585 of the NAACP revealed that eight of the nine all-white schools had all-white facilities, while half of the black teachers were concentrated in just two schools which were 81% and 91% black.

in the Jackson School District, and most minority teachers were recent hires, minority teachers on the whole had significantly less seniority than non-minority teachers. An analysis of the 1981 seniority list -- the only seniority list in the record -- shows a striking disparity in minority and non-minority seniority.

Of the 518 teachers on the 1981 seniority list, 68 (13.1%) are indicated as minority employees and 450 (86.9%) are indicated as non-minority. The median seniority date for non-minority teachers is July 19, 1967. In other words, half of the non-minority teachers on the seniority list were hired before July 19, 1967 and half were hired after that date. The median

seniority date for the minority teachers is August 29, 1972. Simply put, minority teachers on the average had approximately five years less seniority than non-minority teachers. This is a significant disparity, particularly in light of the fact that, had the layoff in 1981 of 70 teachers been based strictly on seniority, it would have resulted in the layoff of teachers with approximately five years or less of seniority.8/

Other methods of statistical analysis reveal a significant disparity

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8/ Pet. Lodging, 1-2; Pet. Brief p. 31 n.27; J.A. 94-100 (employee 70th from end of March 1, 1981 seniority list had seniority date of January 13, 1976).

between the seniority of minority and non-minority teachers. Of the most senior third of the teachers on the seniority list, for example, only six out of 173 (3.5%) are minority. Of the least senior third of the teachers on the seniority list, 48 out of 173 (27.7%) are minority.9/

Had the Jackson School Board laid off the fifty least senior teachers in 1981, sixteen (32%) would have been minority. In other words, the percentage of minorities in the group of employees laid off would have been more than double the percentage of minorities

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9/ J.A. 57-100.

in the teacher population as a whole (13%). The minority percentage of the workforce would have declined from 13.1 percent before the layoff to 11.1 percent after the layoff.10/

The attention by petitioners on the actual layoff which occurred in 1981-1982 obscures the fact that, when the School Board and the union first agreed to Article XII in 1972, they did not know when layoffs would occur, how severe they would be, and what the rate of minority employment would be up to the date of layoff. What is relevant is

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10/ J.A. 95-100. Respondents correctly point out that the collective bargaining agreement did not require application of strict seniority, even apart from Article XII.

not simply the actual layoff which occurred in 1981-82, but the layoffs which could reasonably have been anticipated in 1971-72 when the School Board and union negotiated and ultimately agreed on Article XII. The record indicates that the potential for a layoff with a severely disparate impact on minority employees was quite substantial in 1972. Thus, had the School Board on September 1, 1972 laid off the twenty-five least senior teachers, thirteen of the twenty-five (52%) would have been minorities.11/

11/ J.A. 86-88. Because the record does not contain a 1972 seniority list, the preceding calculation is based on the 1981 seniority list which, of course, does not reflect teachers who left the employ of the School Board between 1972 and 1981.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE EMPLOYERS AND UNIONS TO ADOPT A STRICT LAST-HIRED, FIRST-FIRED SENIORITY SYSTEM TO SELECT EMPLOYEES FOR LAYOFF.

Petitioners appear to suggest in their brief that the Constitution somehow forces the School Board and the union to adopt a last-hired, first-fired seniority system to select employees for layoff. After assuming that a last-hired, first-fired seniority system is a constitutional given, petitioners then treat any race conscious alteration of such a system as a racial preference, thereby invoking the Fourteenth Amendment. Both steps in petitioners' argument are flawed.

We start with the obvious premise that the Constitution does not require public or private employers to

have any kind of seniority system to select employees for layoff. An employer and union could agree, for example, that an employer could select employees for layoff based on the employer's subjective evaluation of which employees are best able to perform the remaining work. Alternatively, the employer and union could agree that the employer would administer validated, job-related competency tests and select those employees with the lowest scores for layoff. The employer and union could also agree to select employees to be laid off by lot -- for example, by pulling names out of a hat.

This Court's precedents also make it clear that, if an employer and union agree on a particular contractual

provision governing selection of employees for layoff, they nevertheless remain free to revise or eliminate that provision in subsequent contracts. Franks v. Bowman Transportation Co., 424 U.S. 747, 778-79 (1976); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Aeronautical Industrial District Lodge 727 v. Campbell, 337 U.S. 521 (1949). The employee has no vested property interest in a particular seniority system. As one leading labor law commentator has stated:

> "Thus, seniority rights provided for in a collective bargaining agreement may be modified or eliminated by agreement of the union and the employer so long as they act in good faith, and this change may be effected without the consent - indeed, against

> the wishes - of the individual employee."12/

While seniority systems are widespread in our economy, it is important to bear in mind that they are frequently inequitable in their application. Under a standard last-hired, first-fired system, for example, a worker with twenty years' experience who was hired by a particular employer a year ago would be laid off before

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12/ B. Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv.L.Rev. 1532, 1533-34 (1962). See also Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); Franks v. Bowman Transportation Co., 424 U.S. 747, 778 (1976); Whitfield v. United Steelworkers of America, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959).

an employee who was hired by the employer two years ago, with no previous experience. In the school context, a highly gifted teacher employed for four years would be laid off before a less competent teacher employed for six years. Seniority not only does not necessarily equate to merit; seniority does not even necessarily equate to experience. And yet, the mechanical nature of seniority is one of its chief advantages. A merit system for selecting employees for layoff would involve inherently subjective evaluations of employees' relative ability. A simple last-hired, first-fired seniority system, by contrast, allows employees to be selected for layoff from a list by reference to one arbitrarily selected criteria -- date of hire.

In our complex industrial society, seniority and layoff provisions assume an almost infinite variety. Seniority preference may be determined on a geographical or district basis, or on a plant, departmental or craft basis. The employees who are laid off from a particular job may have complex rights to bump back to other, low-paying jobs, thereby forcing the layoff of other employees.13/ It has never been seriously suggested that the Constitution forces public or private employers and unions to adopt any particular form of seniority or layoff provisions in their collective bargaining agreements, or indeed to have any such provisions at all.

13/ See generally B. Aaron, note 12 supra, at 1534-35.

II. WHILE ARTICLE XII IS RACE CONSCIOUS, IT DOES NOT CREATE A PREFERENCE BASED ON RACE.

Article XII does not impose a preference based on race. True, it is race conscious in that it ameliorates the disparate impact on minority employees of strict seniority by requiring that employees be selected for layoff in the same proportion as their percentages in the employer's current workforce. That result, however, creates no preference for any racial group. Article XII achieves the very same result in terms of racial makeup of employees selected for layoff as would be achieved by selecting employees for layoff by lot, a procedure which the School Board and union clearly have the constitutional power to adopt in order to avoid the disparate impact on minorities of a

strict seniority layoff system. Thus, if the School Board selected employees for layoff by lot, the laws of probability would dictate that the employees selected for layoff would have approximately the same racial makeup as the then-current teacher workforce. Selecting employees for layoff by lot would eliminate the disparity resulting from the fact that minorities are not evenly distributed in terms of hire date. In terms of racial impact, Article XII achieves the same result as would be achieved by a purely colorblind, neutral system of selecting employees for layoff by lot. As such, it does not create any racial preference.

Viewed in this light, Article XII can best be characterized as an

amalgam of two racially neutral methods of selecting employees for layoff -- strict seniority and random selection. It avoids the disparate impact of strict seniority by achieving the same racial distribution as would be achieved by a random selection method. It then uses seniority to determine which individual employees will be laid off to achieve that result. It does not create a preference for any racial group. Employees are selected for layoff from all racial groups in direct proportion to their percentage representation in the current workforce. No immunity from layoff is granted to members of any racial or ethnic classification.

While petitioners are unquestionably correct in asserting that each

individual employee has the right to assert the protections of the Fourteenth Amendment, petitioners are wrong in suggesting that the union and School Board violated the rights of petitioners simply because petitioners were selected for layoff under Article XII and would not have been selected for layoff had strict seniority been the only layoff criteria. As noted earlier, the union and School Board, consistent with the Fourteenth Amendment, could have rejected seniority altogether and agreed to select employees for layoff by lot in order to avoid the disparate impact on minorities of a pure seniority system. Had they done so, the employees so selected would clearly have no basis for contending that their rights under the Fourteenth Amendment had been violated.

Two different facially neutral methods of selecting employees for layoff (random selection and seniority) will result in the selection of different individual employees in a given instance. Yet each method would be constitutional, and the changeover from one method to another would also be constitutional.

III. THE FOURTEENTH AMENDMENT PERMITS THE VOLUNTARY ADOPTION OF A COLLECTIVE BARGAINING AGREEMENT WHICH REQUIRES RACIALLY PROPORTIONAL LAYOFFS WHERE, ABSENT SUCH A PROVISION, LAYOFFS COULD BE EXPECTED TO HAVE A SUBSTANTIAL DISPARATE IMPACT ON MINORITY EMPLOYEES.

A. Article XII Is a Constitutional Means of Correcting the Disparate Impact of a Layoff On The School District's Minority Employees.

Whatever its other weaknesses, the record in this case clearly demonstrates that application of a strict seniority method to select employees for

layoff would have a substantial disparate impact on minority employees. As noted earlier, had the school district laid off the twenty-five least senior teachers at the start of the 1972 school year (when Article XII was adopted), thirteen or 52 percent of the laid off teachers would have been minorities, even though minorities represented only approximately 8 percent of the teachers at the time. Had the fifty least senior teachers been laid off in 1981, sixteen (32%) would have been minorities even though only 13 percent of the total teacher population was then minority.14/ The School Board and union adopted a constitutional means for ameliorating this adverse impact.

14/ See pp. 10-13, supra.

To begin with, Article XII does not simply purport to seek racial balance for the sake of racial balance or in order to remedy perceived societal discrimination against minorities. See Regents of University of California v. Bakke ("Bakke"), 438 U.S. 265, 290 (1978); United Steelworkers of America v. Weber, 443 U.S. 193, 238-39 (1979) (Rehnquist, J., dissenting). As Respondents' Brief makes clear, Article XII is part of a broader voluntary effort, including affirmative action in hiring, to correct a history of underrepresentation of black teachers in the school district. The hiring aspect of the affirmative action program was not challenged below and is not at issue here. Moreover, the record does not allow the Court to evaluate the constitutionality

of the hiring aspect of the affirmative action program. There is no record, for example, as to what methods were used by the School Board to meet its goal of increased minority hiring, and there is nothing in the record to suggest that the School Board used a quota system which gave preference to a black applicant over an equally qualified or more qualified white applicant based solely on race.

The purpose and operation of Article XII is, in contrast, clear from the record. Article XII was not designed to rectify past societal discrimination. Rather, it was rooted in the fact that a strict seniority layoff would have a substantial present or future disparate impact on minorities given this employer's seniority list.

Second, the means adopted by Article XII are far different from the racial quota held unconstitutional by a majority of the Court in Bakke. The special admissions procedure attacked in Bakke created an arbitrary preferential quota for minority students and resulted in a more qualified non-minority applicant being rejected in favor of a less qualified minority applicant.15/

15/ In Bakke, 16 out of 100 spaces in the entering class were reserved for applicants to the special admissions program. The only applicants to the special admissions program selected for one of the 16 slots were minorities. For the 1974 entering class, 3,737 applicants were submitted for 100 seats, of which only 84 were available to whites. Thus, a white applicant's chance of admission was 84/3,737 or 2.2%. In 1974, 456 minorities vied for the 16 spaces in the special admissions program so that 3.5% of all minority applicants were accepted under the special admissions program -- in addition to minorities accepted through the regular admissions program. Bakke, 438 U.S. at 273 n.2 and 275 n.5.

Here, in contrast, Article XII does not create any preferential immunity from layoffs for minority employees. Minority and non-minority teachers are laid off in direct proportion to their percentage in the current teacher workforce. Furthermore, neither the pure seniority system advocated by petitioners nor the modified seniority system adopted by respondents results in the retention of less qualified teachers at the expense of more qualified teachers. All current teachers are qualified. Individualized evaluations of relative merit and qualifications are ignored by both systems in favor of mechanical means of selecting teachers for layoff.

Indeed, the same considerations which underlay Justice Powell's

approval in Bakke of the Harvard College Admissions Program should lead to approval of Article XII here. Harvard College's Admission Program rejected the use of a single criterion of scholarly excellence to select from the pool of qualified candidates, based on the conclusion that "diversity adds an essential ingredient to the education process." 438 U.S. at 321-322. In the present case, the union and School Board have rejected the use of a single criterion -- seniority -- to select from the pool of qualified teachers those who will be retained. Instead, they have added a second criterion -- preservation of ethnic and racial diversity. The nature of the layoff selection process is necessarily very different from the process of selecting from a pool of college

applicants, and is different from the process of selecting from a pool of teacher job applicants. The individualized consideration in the Harvard College Admissions Program which the Court lauded in Bakke cannot realistically be applied in the layoff context. Yet there is a fundamental shared premise of both Article XII and the Harvard College Admissions Program -- that racial and ethnic diversity can legitimately be added as a criterion in the selection process.

The mechanism adopted by Article XII is a reasonable means to achieve the goal of racial and ethnic diversity in a layoff context where individualized consideration of individual merit is not feasible, yet the record

demonstrates that a pure seniority system will have a severe disparate impact on current levels of minority employment. Fullilove v. Klutznick, 448 U.S. 448 (1980).

The race conscious adjustment of a seniority system does not bring into play many of the concerns expressed over race conscious adjustments to employer decisions which are normally based solely on merit. In Bakke, for example, Justice Powell expressed the concern that preferential programs for members of racial or ethnic groups

> "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Bakke, 438 U.S. at 298.

See also DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

These concerns are unwarranted here. A last-hired, first-fired seniority system does not select employees for layoff based on factors having a direct relationship to individual worth. As noted earlier, seniority does not measure ability or worth, nor is it even a direct measure of experience. Adjusting a seniority system to ameliorate the disparate impact of a layoff based strictly on seniority does not in any way suggest that minority employees lack the ability, talent or drive to "make it" on thei: own.

The fact that there was no formal administrative or judicial determination that the Jackson School District discriminated against minority teachers should not change the result. Under the Court's judgment in Bakke, Harvard College can administer its admittedly race conscious admissions program even though no court or administrative body has ever found that the college discriminates against minority applicants. Race conscious remedies have been approved where no judicial findings of discrimination have been made. McDaniel v. Barresi, 402 U.S. 39 (1971); United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977). See Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351

(1974). See also Katzenbach v. Morgan, 384 U.S. 641 (1966).

B. One of the Fundamental Purposes of the Civil Rights Act of 1964 Is To Correct Employment Practices Which Have a Disparate Impact On Minorities But Cannot Be Justified By Business Necessity.

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court unanimously held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., must be interpreted not only to reach intentional discrimination, but also to prohibit facially neutral employment practices which have a disparate impact on minorities.

> "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. at 432. (Emphasis in original.)

See also Albermarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975).

In Griggs, the Court held that Title VII forbids the use of any employment or promotion criterion which is discriminatory in effect, unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. at 432.

A showing by an employer that an employment or promotion criterion is job related is not sufficient, however. The employer must also show that the criterion is justified by business necessity -- that is, the employer must show that there are no other selection

devices, without a similarly undesirable racial effect, which would serve the employer's legitimate interest in an efficient, competent workforce. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973); Albermarle Paper Co. v. Moody, 422 U.S. at 425.

As the Court has summarized in International Brotherhood of Teamsters v. United States ("Teamsters"), 431 U.S. 324 (1977), under a disparate impact theory, Title VII generally prohibits "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters, 431 U.S. at 335 n.15. Thus, there is a strong public policy, reflected in Title VII, that employers correct

those employment practices which, though neutral on their face, have a significant disparate impact on minority employees and cannot be justified by business necessity.

C. The Immunity Provided In Section 703(h) of Title VII Does Not Prevent Employers and Unions From Voluntarily Agreeing To Correct the Disparate Impact of a Layoff.

In Teamsters, the Court recognized that seniority systems appeared to be one kind of practice which could be attacked under Title VII as "fair in form, but discriminatory in operation." Teamsters, 431 U.S. at 349. Seniority systems, moreover, cannot satisfy the "business necessity" test as there are other selection methods which would serve the employer's legitimate interest

in reducing the workforce without the undesirable disparate racial impact. The Court concluded, however, that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), was intended by Congress to immunize bona fide seniority systems from judicial attack under Title VII even though they have a disparate impact on minority employees, may tend to perpetuate into the present the effects of past discrimination, and cannot satisfy the "business necessity" test. Nowhere in Teamsters, however, does the Court suggest that employers and unions are forced to accept the disparate impact of strict seniority systems on minority employees. Nowhere in the legislative history relied upon in Teamsters did Congress indicate that employers and

unions were forced to accept that disparate impact.16/ Section 703(h) of

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16/ In dissent in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), the Chief Justice has argued that the legislative history does indicate that Congress intended to prohibit voluntary race conscious adjustment of seniority systems. 443 U.S. at 240 (Burger, C.J., dissenting). The Chief Justice relied on remarks in an interpretative memorandum by Senators Clark and Case which stated that, even if an employer discriminated in the past

> "'He would not be obliged -- or indeed permitted -- to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.' Ibid. (emphasis added)." Ibid.

(footnote continued on following page)

Title VII may well have immunized strict seniority from judicial attack if adopted in good faith by an employer and union. But Section 703(h) does not require the collective bargaining agreement to follow strict seniority, nor does it prohibit a collective bargaining

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(footnote continued from previous page)

We respectfully suggest that the comments of Senators Clark and Case could also be read in a more limited manner to mean only that an employer unilaterally could not rely on Title VII to give special seniority rights to blacks contrary to a collective bargaining agreement. The Senators' remarks do not go so far as to suggest that an employer and union cannot revise a seniority system to ameliorate its disparate impact on minorities. See also United Steelworkers of America v. Weber, 443 U.S. at 207 n.7 (construing remarks of Senators Clark and Case in light of subsequent adoption of Section 703(j), 42 U.S.C. § 2000e-2(j)).

agreement from mitigating the disparate impact on minorities of a seniority system.

In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Court again acknowledged that collectively bargained seniority systems would seem to fall under the Griggs rationale prohibiting policies and practices which are neutral on their face but nevertheless discriminate in effect against a particular group. The Court reaffirmed, however, that Section 703(h) was designed to immunize a collectively bargained seniority system from a judicial finding of liability under Title VII. The Court's rationale did not go so far as to prohibit an employer and union from agreeing to modify the seniority system

to ameliorate its disparate impact. To the contrary, the Court reasoned in American Tobacco that, when Congress enacted Section 703(h), it struck a balance between two conflicting policies -- the policy to eliminate discrimination in employment and "the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements." American Tobacco Co. v. Patterson, supra, 456 U.S. at 76-77. See also California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980).

In the present case, neither Congress nor the courts need choose between conflicting policies. Here, the parties have voluntarily modified their collective bargaining agreement themselves to serve one of the principal

purposes of Title VII -- prohibiting practices that, while neutral on their face and intent, have a disparate impact on particular racial or ethnic groups and cannot be justified by business necessity. The policies of Title VII and the policy of minimal supervision by the courts over the substantive terms of collective bargaining are both served by allowing Article XII to operate pursuant to its terms.17/

17/ Thus, affirming the judgment of the Court of Appeals is fully consistent with this Court's decision in Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S.Ct. 2576 (1984). There, the Court held that a district court may not modify a consent decree "to disregard a seniority system" simply because proposed layoffs would have an adverse effect on minority employees.

(footnote continued on previous page)

In United Steelworkers of America v. Weber, 443 U.S. 193 (1979), the Court held that an employer and union may voluntarily agree to a race-conscious affirmative action plan which modified seniority rights to favor minorities for places in a training program. Minorities were historically

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(footnote continued from previous page)

The Court did not reach the issue of whether the City, as a public employer, could have disregarded the seniority system. ___ U.S. at ___, 104 S.Ct. at 2590. See also id., ___ U.S. at ___, 104 S.Ct. at 2592-93 (O'Connor, J., concurring) (emphasizing that the union did not participate in the negotiation of the consent decree). See also Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 486-489 (6th Cir. 1985) (distinguishing voluntarily adopted provisions from the court-ordered abandonment of seniority at issue in Stotts).

underrepresented in the various crafts at issue. The contract provision involved in Weber was preferential to blacks in a very real sense. It reserved 50 percent of the openings for black applicants, even though the local workforce was only 39 percent black. The Court's opinion in Weber established that employers and unions may take voluntary action to correct practices which have had or will have disparate impacts on minority employees, regardless of whether a court could invalidate the practice:

> "Further since the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act." 443 U.S. at 200.

Weber, of course, was a Title VII case, and the Court noted that it

was not deciding whether the plan would have been constitutional under the Fourteenth Amendment if adopted by a public employer. 443 U.S. at 200. In the present case as well, this Court need not reach the thorny issue of whether the Fourteenth Amendment prohibits a public employer from negotiating a collective bargaining agreement which grants preferential treatment to minority employees. Article XII does not prefer blacks over whites like the plans at issue in Weber or Bakke. It does not immunize blacks from layoff. It does not provide that blacks will be laid off at a slower rate than whites. It simply provides that minority employees can be laid off in no greater percentages than their percentage in the workforce. It is a race-conscious remedy which is race-neutral in impact.

The Court should be particularly solicitous of voluntary measures by employers and unions to deal in their collective bargaining agreements with possible layoffs. While it is easy in hindsight to calculate the effect of alternative layoff provisions on a given layoff, the union and School Board did not have the benefit of a crystal ball when they negotiated Article XII. They could not know when layoffs would occur, how many teachers would be laid off, which particular schools would experience the most severe declines in enrollment, and what the precise racial mix would be on the date of layoff. They did know, however, that blacks on the average had significantly less seniority than whites and that a strict seniority

system would have a significant disparate effect on black teachers. The seniorty gap between whites and minorities persisted after the initial adoption of Article XII, and continues to this day, warranting continuation of Article XII in subsequent contracts.

Article XII is well designed to deal with the potential disparate impact of an uncertain future layoff on black employees. It does not require that layoffs be disproportional in favor of blacks or otherwise set quotas for white and black layoffs. It does not require even that the racial makeup of individual schools be frozen. Article XII simply requires generally that a

layoff not have a district-wide disparate impact on any minority group.

Here, the employer and union had a legitimate concern not simply to correct past underrepresentation of blacks, but also not to engage in <u>future</u> practices which would have a substantial disparate impact on blacks. This Court has never held or suggested that public or private employers are powerless to modify employment practices which have severe disparate impacts on minority employees. It should not do so now.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that

this Honorable Court affirm the judgment of the Court of Appeals.

DATED: August 23, 1985

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No. 84-1340

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, SUSAN LAMEY, JOHN KRENKEL, KAREN SMITH, SUSAN DEBOLD, DEBORAH BRZEZINSKI, CHERYL LASKY, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, RICHARD SUSSBROOK, President, DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIREY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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BEST AVAILABLE COPY

Consent of the Parties

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

The Interest of the National Association for the Advancement of Colored People

The National Association for the Advancement of Colored People ("NAACP") is a New York non-profit membership corporation. Its principal aims and objectives may best be understood by reference to its Articles of Incorporation:

> . . . voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.
>
> To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any and all things which may lawfully be done by a membership corporation . . .

The NAACP has a long-standing history of participating in the United States Supreme Court, both as a party and as *amicus curiae,* in cases presenting constitutional and statutory claims of racial discrimination.

The NAACP is vitally concerned with the issues raised in this appeal. The resolution of these issues will have a direct bearing on whether municipalities, state governments, public boards of education, as the Jackson (Michigan) Board of Education, teachers, and teacher unions, as the Jackson Education Association, may voluntarily adopt

policies and programs which simultaneously seek to remedy the ill results of past and existing racial discrimination and segregation in public education and employment. What is involved here is whether a public school authority and a teachers' union may voluntarily include provisions in a collective bargaining agreement which promote equal educational and employment opportunities for black, white, and Hispanic students and teachers respectively within the principles of the United States Constitution and all laws promulgated thereto.

It is because of the overriding public consequences of the decision in this case that the NAACP is filing this brief as *amicus curiae*.

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No. 84-1340

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BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

Statement of the Case

This case concerns the policies adopted by the Jackson Board of Education in response to its mandate to provide quality and equal educational opportunities for black, Hispanic and white students attending the public schools in Jackson, Michigan. For the past twelve years, the Jackson Board of Education has adhered to procedures designed to establish and maintain multi-ethnic representation on the

faculties and staffs for the respective institutions within its educational system. Only the constitutionality of the procedure followed in effecting teacher layoffs, incorporated in the collective bargaining agreement between the representative of the teachers, the Jackson Education Association, and the Jackson Board of Education is challenged herein.

Article XII of the Professional Negotiations Agreement ("Article XII"), in pertinent part, provides:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of layoff . . .

Following the announcement of the proposed layoffs for the 1982-83 school year, several white teachers brought this action in the United States District Court for the Eastern District of Michigan to enjoin the Jackson Board of Education from effectuating layoffs in accordance with the provisions of Article XII. The Complaint alleged that the layoff provision violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 1981, 1983 and 1985, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and the constitution and laws of the State of Michigan. *Wygant* v. *Jackson Board of Education,* 546 F. Supp. 1195 (E.D. Mich. 1982).

The action proceeded before the District Court on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and on the Jackson Board of Education's motion to dismiss the Complaint for failure to state a claim upon which relief can be granted, under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In deciding the motions, the District Court considered the facts set forth in the Complaint, Affidavits submitted by

the plaintiffs, briefs and oral arguments of counsel, which were not controverted by either party.

According to allegations set forth in the Complaint, the affirmative action clauses in the collective bargaining agreement were designed to remedy "only general societal discrimination," and not past employer discrimination. On their motion for summary judgment, plaintiffs argued that in the absence of judicial findings of past discrimination in the employment of teachers, the affirmative action clauses in the collective bargaining agreement lacked legitimacy of purpose and were therefore, violative of the Equal Protection Clause of the Fourteenth Amendment. The District Court, relying upon *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) and *Detroit Police Officers Association* v. *Young,* 608 F.2d 671 (6th Cir. 1979), *cert. den.,* 452 U.S. 938 (1981) found that plaintiffs' contention, that only judicial findings of past employer discrimination would support the voluntary adoption of an affirmative action plan by a public employer and union, was without merit. 546 F. Supp. at 1200.

In the District Court's view, the Jackson Board of Education had satisfied the constitutional requirements set forth in *Weber* and *Young* by the adoption and implementation of Article XII. Evidence of substantial and chronic underrepresentation of minority group teachers was disclosed by the comparison of the percentage of minority group teachers (8.3-8.8 percent) with the percentage of minority group students (15.3 percent) existing at the time the plan was conceived. The District Court observed that while the inquiry as to whether there is minority underrepresentation in a job classification typically focuses on a comparison of the employer's labor force with the relevant labor market, such a comparison was not appropriate when the inquiry concerned the underrepresentation of minorities on a public school faculty. According to the District Court, "teaching is more than just a job. Teachers are role-models for their students." 546 F. Supp. at 1201.

The District Court concluded that Article XII was substantially related to the objective of remedying the substantial and chronic underrepresentation of minority teachers. Article XII was designed to prevent a reduction in the minority to majority faculty ratio and to prevent a loss in minority hiring gains achieved through the operation of the Jackson Board of Education's affirmative hiring policy. The constitutionality of Article XII was premised also on the District Court's findings that it did not (1) impose quotas, (2) require the retention of unqualified teachers, (3) unnecessarily trammel the interests of white teachers, (4) stigmatize white teachers affected by a layoff, or (5) oust white teachers in order to replace them with minorities. Because the provision was subject to the collective bargaining process, and thereby renegotiated periodically, it was necessarily a temporary measure. 546 F. Supp. at 1202.

The Title VII claims asserted in the Complaint were dismissed for lack of jurisdiction. The District Court's decision upholding the constitutionality of Article XII required the dismissal of plaintiffs' claims under 42 U.S.C. Sections 1981, 1983 and 1985.

In its affirmance of the District Court's decision granting summary judgment in favor of the Jackson Board of Education, the Sixth Circuit characterized the controversy as a "school case tangentially involving segregation in public schools—this concerning a formula for layoff of teachers of minority races during economically required reductions in staff." *Wygant* v. *Jackson Board of Education,* 746 F.2d 1152, 1134 (6th Cir. 1984). The evidence presented to the District Court and reviewed by the Sixth Circuit was sufficient to establish that the initial adoption of the affirmative action provisions in the collective bargaining agreement coincided with the examination and revision of educational policies to redress problems of racial segregation and isolation in the Jackson Public Schools.

In their Brief, Respondents have presented a detailed statement of the facts and circumstances preceding the adoption of the challenged provision and, accordingly, a restatement of those facts will not be presented herein. The District Court determined that the problem of minority underrepresentation on the faculty was not seriously considered by the Jackson Board of Education until 1969. One of the most significant influences on the timing of the deliberations over faculty desegregation and integration was not mentioned in the District Court's opinion. It is therefore important to note, that in April 1969, the Jackson Branch of the NAACP filed charges against the Jackson Board of Education with the Michigan Civil Rights Commission. The NAACP Complaint alleged, *inter alia,* that black students were being denied guaranteed rights to equal educational opportunity as a result of discriminatory acts in the areas of discipline, assignment and training, curriculum and counselling. Significantly, the NAACP alleged also that the low percentage of black professionals in the school district was indicative of the Jackson Board of Education's discriminatory hiring policies.

The Michigan Civil Rights Commission's investigation of the Complaint uncovered evidence which substantiated the NAACP's charges. Following the investigation, the Commission recommended, and the Jackson Board of Education agreed, that the following affirmative steps be taken to implement its policy of equal opportunity in all areas of education: (1) establish an in-service course on Intergroup Relations; (2) adopt a multi-cultural curriculum; (3) implement new discipline procedures; (4) recruit, hire and promote minority group teachers as positions become available; (5) review teacher assignments so that good balance is reflected in all schools from a standpoint of race, age, sex, background and experience; and (6) discontinue its practice of "tracking" in certain subjects.

Petitioners and various *amici curiae* insist that only judicial or administrative findings that an employer pre-

viously engaged in racially discriminatory employment practices, can justify the use of race in employment decisions. Further, it is argued that considerations of race can never override considerations of seniority in layoff decisions, where it would result in the retention of a less senior minority who has not been judicially determined to be an actual victim of the employer's past discrimination. In the absence of such findings, they argue that the courts below erred as a matter of law, in upholding the constitutionality of race-conscious procedures followed by the Jackson Board of Education in effecting teacher layoffs.

It is clear from the Statement of the Case presented by the Respondents that the arguments advanced by the Petitioners distort the history of racial segregation in the Jackson Public Schools. More importantly, Petitioners' contentions ignore the permissible objectives of the educational policy pursued by the Jackson Board of Education and misinterpret this Court's decisions which authorize, if not encourage, the means adopted by the Board to attain its lawful goals.

Summary of Argument

The Equal Protection Clause of the Fourteenth Amendment permits a governmental body, in furtherance of legitimate objectives, to make employment decisions based partly on considerations of race, where, as in the case before the Court, race is not the sole determinant. Given the history of segregation in the Jackson Public Schools, and the constitutional obligation to voluntarily take the necessary steps to establish a school system free of racial segregation, the remedial purpose of the provisions in the collective bargaining agreement relating to the creation and maintenance of multi-ethnic representation on the faculty cannot be disputed. Further, the broad discretion accorded to local school authorities to formulate educational policy allows race and ethnicity to be considered along with a teacher's

professional experience, expertise and seniority in employment decisions, including layoffs of teachers for reasons of economy. No violation of the Fourteenth Amendment arises from policies and practices designed to provide equal educational and employment opportunities for black, Hispanic and white students and teachers in an academic setting established and maintained to reflect the multi-ethnic diversity of this society.

ARGUMENT

I.

A School Board May Voluntarily Adopt and Implement Policies to Establish and Maintain a Completely Integrated School System.

A. *A School Board May Proceed With the Implementation of a Faculty-Integration Plan Without Judicial Findings of Past Discrimination Against Minority Students and Minority Teachers.*

Prior to the initial adoption of Article XII, the Jackson Board of Education operated a school system which denied black students their constitutional rights to equal educational opportunities. While no court was asked to make such a finding, the Jackson Board of Education, the Michigan Civil Rights Commission, the NAACP, the Ad Hoc Committee of teachers and administrators and the Citizens' School Advisory Committee accepted the reality of a racially segregated Jackson public school system. Once the problem of segregated student bodies was addressed by these entities, it became apparent that the segregationist policies of the Jackson Board of Education extended also to the employment and assignment of teachers within the district.

In the 1970-71 school year, there were no black teachers in 13 of Jackson's 22 elementary schools. In each of these schools, the percentage of white students ranged from 64 percent to 100 percent. Not surprisingly, 8 of the 16 black

teachers in elementary education were assigned to two elementary schools. The percentages of black students in these two schools were 86 percent and 64 percent respectively.[1] The practice of assigning black students and administrators only to schools wherein black students comprised the majority, is clearly symptomatic of a system-wide policy of segregation.

Primary responsibility for disestablishing the system of segregated schools rests with local school authorities. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, 226 (1969). In *McDaniel* v. *Barrisi,* 402 U.S. 39 (1971), the Court acknowledged the competence of school boards to assess whether its schools were unlawfully segregated and their constitutional obligation to take voluntary affirmative steps to convert to a unitary system. Further, in *Montgomery County, supra* at 232, the court recognized the essentiality of faculty desegregation to the establishment of a public school system free from racial discrimination. The goal to be attained is a ratio of minority to non-minority faculty members in each school that approximates the ratio of minority to non-minority faculty members in the entire school district. Id.

The Jackson Board of Education's desegregation plan contemplated that no school in the district would be identifiable by the racial composition of its teaching staff and that each school would have a multi-ethnic faculty. It immediately realized that a reassignment of the black teachers, then employed, would still leave the faculties of the majority of the schools without the desired multi-ethnic representation. The affirmative action plan for hiring additional minority teachers, conceived and implemented by the Jackson Board of Education, is the appropriate remedy for a problem not uncommon to school desegregation cases.

In *United States* v. *Texas Education Agency,* 467 F.2d 848, 873 (5th Cir. 1972), the Fifth Circuit required the

[1] Department of Health, Education and Welfare, Office of Civil Rights, Elementary and Secondary Public School Survey, Fall 1970.

school district to take similar affirmative action to increase the number of Mexican-American teachers in order to fulfill the mandate of *Montgomery County.* It is significant that the Fifth Circuit, as did the courts below in this case, compared the percentages of Mexican-American teachers to the percentage of Mexican-American students in the school district, in deciding that affirmative action was required to achieve an equitable ratio of minority to non-minority faculty members. In *Fort Bend Independent School District* v. *City of Stafford,* 651 F.2d 1133 (5th Cir. 1981), the Fifth Circuit clarified its holding in *Texas Education Agency* regarding faculty integration, when it considered the question of whether a school district has effectively carried out the mandate of *Brown* v. *Board of Education,* 349 U.S. 294 (1955), and thereby attained unitary status. According to the Fifth Circuit in *Fort Bend, supra* at 1137, a showing of a good faith effort to find sufficient qualified minority teachers to achieve an equitable ratio will rebut any inference of continuing discrimination against minority school children. The establishment and maintenance of a faculty with a percentage of minority teachers equal to that of the percentage of minority students in the school district, however, was held not to be a prerequisite to the attainment of unitary status. The Sixth Circuit, in *Oliver* v. *Kalamazo Board of Education,* 706 F.2d 757 (6th Cir. 1983), adopted the Fifth Circuit's interpretation of the goal to be attained by faculty-integration plans.

The courts in *Oliver* and *Fort Bend* did not hold, as Petitioners' contend, that the racial composition of the student population may never be considered when the inquiry is whether there is adequate minority representation on a teaching staff. Rather, *Oliver* and *Fort Bend* instruct that the disparity between the percentages of minority students and minority teachers does not justify the imposition of racial quotas under an affirmative plan, to achieve a percentage of minority teachers that matches the percentage of minority students in a school district. The Jackson Board

of Education's affirmative action plan does not, by design or effect, contravene the principles set forth in *Oliver* and *Fort Bend*.

When the layoff provision in the collective bargaining agreement is viewed, as it must be, as but one component of a voluntary plan to desegregate and integrate the Jackson public school system, the legitimacy of the governmental purposes served thereby, cannot be disputed. Sound and enlightened educational policy and the obligation to correct the effects of practices which have limited the educational and employment opportunities of minority students and teachers, provide the justification for faculty-integration plans contained in the collective bargaining agreement.

The plenary power of school boards to formulate and implement educational policy which prescribes the complete integration of the school system, was recognized by the Court in *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971). The federal courts have "consistently supported a school system's affirmative duty and discretion to take steps to remedy racial imbalance, a view that perforce applies to a policy of faculty integration." *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 907 (3rd Cir. 1984), *cert. den.*, 53 U.S.L.W. 3483 (Jan. 8, 1985). Thus, the argument that voluntarily adopted race-conscious faculty integration plans violate the Equal Protection Clause of the Fourteenth Amendment has been considered and rejected by the courts in the Second, Third and Ninth Circuits. See *Porcelli* v. *Titus*, 431 F.2d 1257 (3rd Cir. 1970), *cert. den.*, 402 U.S. 944 (1971), *Zaslawsky* v. *Bd. of Ed. of Los Angeles*, 610 F.2d 661 (9th Cir. 1979), *Caulfield* v. *Board of Education of the City of New York*, 632 F.2d 999 (2d Cir. 1980) and *Kromnick* v. *School District of Philadelphia, supra.* The race-conscious teacher layoff provision here is substantially similar, in both its purpose and operative effects, to the faculty integration plans before the courts in *Porcelli, Zaslawsky, Caufield* and *Kromnick*. Adherence to the analysis and reasoning of the Third Circuit in *Kromnick*, compels a similar conclusion as to the constitutionality of the teacher layoff plan before this Court.

In *Kromnick*, the Third Circuit considered whether the Fourteenth Amendment and Title VII were violated by the implementation of a faculty-integration plan requiring the mandatory reassignment of teachers to maintain a ratio of black and white teachers in each school, reflective of the racial composition of the overall teaching staff. Teacher transfers under the reassignment plan adopted by the Philadelphia school board, were made on the basis of seniority, with the least senior teachers being reassigned to fill vacancies within the district. If adherence to strict seniority would result in racial imbalance, then teachers of the over-represented race were to be reassigned, notwithstanding their seniority. Decisions on requests for voluntary transfers were also conditioned upon the maintenance of racial balance. As in the case before the Court, the faculty reassignment plan was incorporated in the collective bargaining agreement between the school district and the teachers' union.

The appellees in *Kromnick*, argued, as do the Petitioners, that the mandatory reassignment plan served no legitimate purpose because it was designed to preserve the status quo and not to remedy past discrimination. But the Third Circuit, 739 F.2d at 905, concluded that the plan to integrate faculties was remedial and a necessary part of the desegregation effort as the Philadelphia school district was still obligated to eliminate racially identifiable schools. Judge Sloviter observed:

> . . . [B]ecause our society has not yet achieved full integration among its component races, in important areas of public life, including housing, employment, and public education, a reasonable plan designed to foster racial balance of public school teachers must be considered as directed toward remedying still existent

racism, even without an applicable court order or pending administrative proceeding. Id.

The court in *Kromnick* relied, in part, upon the wide discretion granted to school boards to formulate educational policies, in deciding that the school board had the authority to implement a race-conscious teacher assignment policy to further educational goals. Additional support for concluding that local and state governmental authorities possessed the competence to adopt race-conscious policies was found in *Detroit Police Officers Assn.* v. *Young, supra,* wherein the Sixth Circuit determined that the Board of Police Commissioners had the authority to voluntarily adopt an affirmative action plan.

The Third Circuit's analysis under the Fourteenth Amendment considered whether the plan adopted by the Philadelphia Board was narrowly tailored to achieve its objective, so as to limit the burden suffered by others. The inquiry, thus, focused on whether the operation of the race-conscious teacher assignment plan gave rise to the evils associated with unconstitutional racial classifications. The court determined that because the plan required the transfer of both black teachers and white teachers, it could not be deemed "racially preferential." No evidence was presented to indicate that the plan: (1) disproportionately impacted upon one race; (2) stigmatized or stereotyped racial groups or (3) imposed racial quotas. As the plan was subject to periodic renegotiation through the collective bargaining process, it was deemed "temporary." The Court, therefore, concluded that the race-conscious teacher reassignment plan was constitutional. 739 F.2d at 907-908.

Neither does the race-conscious layoff provision in the collective bargaining agreement before this Court, operate as an unconstitutional racial classification. Layoffs under the plan affect both white teachers and black teachers and in a proportionate manner. No stigma attaches to any

teacher because of economically required layoffs. The plan is flexible in its numerical requirements because the percentages are based on the racial composition of the faculty which changes from year to year. Because it is subject to periodic renegotiation under the collective bargaining process, the plan must be viewed as temporary. Finally, it violates no contractual or statutory rights of the Jackson school teachers.

That the Jackson Board of Education has taken steps to insure that its educational policy, to establish and maintain multi-ethnic diversity in the curriculum, student bodies, and teaching staffs, is not frustrated by fiscal constraints, is really the gist of the controversy before this Court. When reductions in the teaching staff are required for reasons of economy, experience demonstrates that layoff decisions, based solely on seniority, do not result in multi-ethnic teaching staffs. Yet, considerations of race, professional experience, expertise, along with seniority, do preserve the ethnic diversity on the faculty deemed essential to the quality of education provided in the Jackson Public Schools.

In *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 314 (1978), the plurality of the court recognized that because ethnic diversity contributes substantially to the educational process, race, along with other factors, may be considered in the selection of students for admission to institutions of higher education. Certainly, the principles set forth in Justice Powell's opinion in *Bakke,* would allow a school board to consider race, along with other factors, in its employment decisions, where the goal is to attain ethnic diversity.

The criticality of racial and ethnic diversity on the public school faculty is reflected in the view, expressed by the courts below, that "teaching is more than a job." As the Third Circuit observed in *Kromnick, supra,* at 906.

> Schools are great instruments in teaching social policy, for students learn not only from books, but from the

> images and experiences that surround them. One such lesson is of a spirit of tolerance and mutual benefit, a lesson that is more difficult to absorb when schools attended by black students are taught by black teachers while schools attended by white students are taught by white teachers.

Given the legitimacy of each of the objectives of the educational policies adopted by the Jackson Board of Education and the reasonableness of the procedures it has implemented in furtherance of those objectives, the courts below were correct in upholding the constitutionality of the teacher layoff provision.

B. *A School Board and Teachers Union May Negotiate Modifications to a Bona Fide Seniority Plan.*

The collective bargaining agreement between the Jackson Board of Education and Jackson Education Association incorporates and continues the basic seniority system for the teachers in the Jackson public school system. The Jackson Board of Education did not violate the seniority system when the race-conscious provisions concerning the hiring and retention of minority teachers were instituted within the contract since the two contested provisions were only one of several which pertained equally to the recruitment, hiring and retention of teachers in the system. All teachers are *directly* subject to its terms, and thereby no third-party relationships exist between the teachers and the Jackson Board of Education. The collective-bargaining agreement which has been signed by the teachers, the Jackson Board of Education, and the Jackson Education Association continuously since 1973, which includes the contested race-conscious language, is a voluntary agreement bargained for on an equal basis by the respective parties.

Petitioners' contentions seek to equate seniority rights with the fundamental rights guaranteed by the Constitu-

tion. Yet, seniority rights owe their existence to the collective bargaining process and, as such, are contractual by nature. And while the Jackson Education Association owes a duty of loyalty to all of its members, the law recognizes that a union cannot always satisfy the competing interests of all in its collective bargaining negotiations. In *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953), this Court observed:

> Inevitably differences arise in the manner and the degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The discretion granted to bargaining representatives permits the Jackson Education Association to agree that seniority principles may be subordinated in layoff decisions, if necessary, to preserve ethnic diversity.

The aforementioned factual elements directly distinguish this action from *Firefighters Local Union No. 1784* v. *Stotts,* 164 S.Ct. 2576 (1984) and recent federal circuit court decisions support this distinction. *Turner* v. *Orr,* 759 F.2d 817, 824 (11th Cir. 1985); *Equal Employment Opportunity Commission* v. *Local 638,* 753 F.2d 1172 (2d Cir. 1985); *Vanguards* v. *City of Cleveland,* 753 F.2d 479 (6th Cir. 1985), *reh. den.,* 36 CCH EPDP 35190 (6th Cir. 1985). *Stotts* involved circumstances where a union and white employees were questioning the constitutional validity of a consent decree which was entered in a federal district court in a suit where they were not named parties but the decree affected their rights under a long established seniority

system. Here, a voluntary agreement, not a consent decree, exists between the parties, negotiated by the Petitioners' bargaining representative (the Jackson Education Association), and ratified by the teachers, obviating any correlation between this action and *Stotts*.

Further, the agreement has a life of three (3) years, which provides the teachers with an opportunity to revise any part or provision of the contract deemed unsatisfactory. The race-conscious provisions in the agreement are not permanent and the policy underlying the provision is periodically reappraised at the expiration of the contract. As noted in a similar context in *Kromnick* when the Third Circuit allowed a race-conscious provision in a collective bargaining agreement between the Philadelphia Board of Education and its teachers involving the reassignment of school teachers within the school system by race, the "[policy] is a formal part of the District's collective bargaining agreement, which is subject to biennial renegotiation, and the plan operates in annual cycles, allowing for reevaluation of its continued necessity." 739 F.2d at 912. Such provisions are contractual in nature, and are aimed solely at creating and maintaining integrated public school systems in Jackson and Philadelphia for both students and teachers, and therefore allowed under the U.S. Constitution.

II.

A Race-Conscious Policy or Program in a State Context Is Permissible Under the United States Constitution If It Serves Important Governmental Objectives and Is Substantially Related to Achievement of Those Objectives.

The Court has previously concluded that "racial classifications are not per se invalid under the Fourteenth Amendment." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 356. As stated in a recent federal circuit opinion, "[r]acism . . . has not been eliminated, but the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution have been restored to their intended race-conscious and remedial function." *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 900. A voluntary race-conscious policy or affirmative action program that employs racial classification which is adopted by a governmental entity for remedial purposes is permissible "if the racial classifications designed to further remedial purposes serve important governmental objectives and is substantially related to achievement of the objectives." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 359. This standard has been followed in a number of federal circuit court decisions involving race-conscious policies and programs pursuant to voluntary agreements and consent decrees.[2]

When analyzing a race-conscious policy or program, relevant factors as "(1) the importance and validity of the remedial aim, (2) the competence of the agency to choose such a remedy, and (3) the tailoring of the remedy so as to limit the burden suffered by others," *Kromnick* v. *School*

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[2] *Kromnick* v. *School District of Philadelphia, supra; Bratton* v. *City of Detroit*, 704 F.2d 878 (6th Cir. 1983); *Valentine* v. *Smith*, 654 F.2d 503 (8th Cir. 1981); *Zaslawsky* v. *Board of Education of the Los Angeles City Unified School District, supra.*

District of Philadelphia, 739 F.2d 894, 904, are important in determining whether such a plan "is permissible or entails unconstitutional racial discrimination." Id. If the race-conscious program adopted and incorporated in the collective bargaining agreement by the Respondent Jackson Board of Education and the Jackson Education Association were analyzed under the aforementioned framework, a constitutionally permissible plan would be evident.

Hereinbefore, we have sufficiently established the competency of the Jackson Board of Education to choose a remedy to eliminate segregation and promote integration within its school system. The integration of the faculty at all the elementary, junior high, and high schools was deemed necessary by both the Jackson Board of Education and the Jackson Education Association to allow the students in the Jackson, Michigan public school system the best quality, multi-diverse, and enriching educational opportunities possible. The Jackson Board of Education and the Jackson Education Association properly executed a program which allowed integration of the faculty simultaneous to the integration of the student population within the respective schools of the said academic system. This Court has noted in another context the importance of a multi-diverse faculty and the importance in which teachers are held in our educational institutions by stating:

> "(t)eachers have direct, day-to-day contact with students, exercise unsupervised direction over them, act as role models and influence their students about the government and the political process." *Kromnick* v. *School District of Philadelphia,* 739 F.2d 894, 904 (quoting *Bernal* v. *Fainter,* 81 L.Ed. 2d 175, 180, 104 S.Ct. 2312, 2316-17 (1984).

The Court further recognized in *Bakke* that discrimination still existed within school systems across the nation

and the need to have race-conscious remedies to eliminate such entrenched practices by stating:

> [i]n 1968 and again in 1971, for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.
>
> Against this background, claims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. Id., at 327.

The race-conscious program incorporated within the collective bargaining agreement between the Jackson Board of Education and the Jackson Education Association definitely limits the burden suffered by any faculty member. There is no mandatory number or percentage of minority teachers which the Jackson Board of Education must hire by a date certain stated within the agreement, only an expressed goal. Concerning layoffs, minorities as well as whites are subject to layoffs within the same proportion, thereby treating each faculty member equally.

Therefore, the race-conscious program adopted in the agreement satisfies and meets the standard of review as deliberated in *Bakke* and stated hereinabove.

Concerning the issue as to how much past discrimination must the Jackson Board of Education prove before this Court so as to substantiate its race-conscious programs, in view of the Petitioners' rights under the Fourteenth Amendment, this Court has previously stated that:

> . . . the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions

> of a university or employer who has never been adjudged in violation of an anti-discrimination law are not any more or less entitled to deference than the claims of the burdened non-minority workers in *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 47 L.Ed. 2d 444, 96 S.Ct. 1251 (1976), in which the employer had violated Title VII, for in each case the employees are innocent of past discrimination. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 365.

The same analysis is appropriate in this action in reference to the claims of the Petitioners though there is evidence in the record which indicates past discrimination existed in the Jackson Board of Education School System.

Petitioners contend that their fundamental rights under the Fourteenth Amendment have been infringed upon by means of the race-conscious provisions in the collective bargaining agreement which the Petitioners claim caused their layoffs from their teaching positions with the Jackson Board of Education. However, there are no fundamental rights involved here as with the respondent in *Bakke*. 438 U.S. 265, 357. Further, the Court in *Bakke* stated:

> Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 128, 36 L.Ed. 2d 16, 40, 93 S.Ct. 1278, 1294 (1973); see *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n 4, 82 L.Ed. 1234, 1241, 58 S.Ct. 778, 783 (1938).
>
> Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more. Id., at 357.

Therefore, the Jackson Board of Education need not prove that the race-conscious provision in the collective bargaining agreement furthers a compelling governmental purpose and that no less restrictive alternatives are available since the provision did not affect the fundamental rights of the Petitioners either as individuals or as a class, and such a standard is inappropriate in these circumstances.

Further, race is but one of the factors that the Jackson Board of Education considers when laying off teachers. The Jackson Board of Education considers other factors as subject area, special programs in which the teachers are involved, seniority, and the number of teachers in a particular department and school when laying off teachers. Minority teachers are laid off proportionately to that of the white majority teachers. As the Third Circuit stated in *Kromnick* v. *School District of Philadelphia:* "No case has suggested that the mere utilization of race as a factor, together with seniority, school need, and subject qualification, is prohibited." Id., at 903, a statement which still holds here in this action.

III.

No Title VII Claims Are Before This Court Due to Lack of Jurisdiction.

No claims under Title VII, 42 U.S.C. Sections 2000e *et seq.*, are before this Court due to Petitioners' failure to properly file any charges, or complaints, or initiate any proceedings with either the Equal Employment Opportunity Commission ("EEOC") within one hundred and eighty (180) days after the alleged discriminatory act(s) by Respondents were committed. 42 U.S.C. Section 2000e-5(e). Prior U.S. Supreme Court decisions have held that the jurisdictional and substantive requirements of Title VII are applicable to plaintiffs and defendants when one of the parties is a municipal or state governmental entity or employer. *Connecticut* v. *Teal,* 457 U.S. 440, 449 (1982); *Dothard* v. *Rawlinson,* 433 U.S. 321, 331 (1977). A claim(s) based on an alleged discriminatory act(s) is barred if the charge is not timely filed with the EEOC, and a Right to Sue letter is not issued, since such prerequisites are necessary to file a Title VII action. *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 555 (1977); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974); *Electrical Workers* v. *Robbins & Meyers, Inc.,* 429 U.S. 229, 239-240 (1976). Therefore, the Respondents were entitled to continue their treatment of the Agreement as lawful since the Petitioners failed to file a complaint or charge within 180 days after the alleged discriminatory act. Id.

Further, Petitioners' failure to timely file their charges with the EEOC was raised as a defense by the Respondents in the District Court action and upheld by Judge Joiner, 546 F.Supp. 1195, 1203. Since the Respondents raised the affirmative defense that the Petitioners failed to timely file their charges or complaints and a Letter to Sue was not issued, no waiver was committed by the Respondents. *Zipes* v. *Trans World Airlines, Inc.,* 455 U.S. 385, 392-393 (1982).

CONCLUSION

The case before the Court does not present a situation where a governmental body is using race as a criteria for the purpose of favoring minority group members at the expense and to the detriment of the rights and expectations of Petitioners, members of the majority group. Rather, the Jackson Board of Education's policy and procedures for teacher layoffs, which considers a myriad of factors, including race, is designed to create and maintain a public school system wherein ethnic diversity is reflected in what is taught, who will teach and who will learn.

For the reasons hereinabove stated, it is submitted that this Court should affirm the decision of the Court below dismissing the Complaint in this action.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1985

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v.

Jackson Board of Education, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

This brief amicus curiae in support of Respondents is submitted with the written consents of counsel to all parties. Letters of consent are on file with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for

the fiscal management, staffing, continuity, and educational productivity of the public schools within their jurisdictions. NSBA submits this brief in the belief that the most effective manner of assuring an equal educational opportunity for all school children is through voluntary compliance by school boards and administrators with constitutional and statutory civil rights mandates.

If this Court requires school boards to wait for a court to order compliance with civil rights laws, rather than allowing boards to take the initiative on their own, such a decision could threaten the ability of the nation's public school boards to ensure that school systems are operated in a nondiscriminatory manner and in a climate of cooperation, not coercion.

ISSUE PRESENTED FOR REVIEW

Petitioners frame the issue presented for review as follows:

> Does the Constitution permit a public employer to adopt racial preferences for school teacher layoffs in the absence of judicial or administrative findings of past discrimination in employment or education based solely upon differences between the respective percentages of minority teachers and students?

Amicus respectfully submits that the issue is misstated. The lower court explicitly refused to rule on the question of whether the District Court was correct in utilizing the minority student ratio to determine underrepresentation of teachers, stating "no such issue was presented." 746 F.2d 1152, 1156 footnote 1. The issue decided below, and the issue which Amicus will address in its brief is:

> Whether the Constitution permits a public employer to enter into a collective bargaining agreement which,

> in the event the district finds it necessary to lay off teachers, requires the district to maintain the same majority-minority ratio as existed at the time of the layoffs.

Amicus submits that the issue of the constitutionality of a standard used for hiring of teachers, which compares the student minority-majority ratio with the teacher ratio, is a separate issue from the one which is presented to the Court in this case. The Petitioners did not plead nor did the lower court decide the issue of discrimination in hiring. The sole issue for resolution here is whether the layoff provision in the contract is constitutional.

ARGUMENT

I. INTRODUCTION

Amicus agrees fully with the constitutional arguments made by Respondents and incorporates by reference the arguments set forth in the brief filed

herein by Respondents. Because the constitutional issues are fully briefed by Respondents, Amicus will address the broader policy questions presented by this case.

Petitioners argue for a rule that would prohibit school boards, in absence of a court order, from taking race into account at all in making decisions regarding employees. Such a rule would go beyond the requirements of the Constitution and, equally important, would be poor educational and public policy. As stated by Chief Justice Burger in the landmark case of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school

> should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court."

In absence of clear constitutional proscription to the contrary, school boards should continue to have the authority to use whatever methods they deem appropriate to maximize the benefits of the educational system for the students in the district.

II. THERE IS NO CONSTITUTIONAL DUTY TO GRANT A PREFERENCE TO EMPLOYEES ON THE BASIS OF SENIORITY.

The brief filed herein by Petitioners, as well as the briefs of amici who support the Petitioners' position, imply that the concept of seniority is sacrosanct and endows the senior employee with some kind of special constitutional right. That, of

course, is not the case.

Seniority is not a concept etched in constitutional stone, so heavy that it outweighs other considerations that may validly enter layoff determinations. Certainly, the Court has recognized that public employment contracts may create a property interest meriting due process protections. See, e.g., Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985). However, the Constitution in no way awards incremental degrees of protection based solely on the number of years an employee has held a particular position. Although reducing the faculty in order of seniority may be more objective than other layoff criteria, the relative objectivity should not be confused with issues of constitutionality.

Preserving seniority rights of public

employees during a reduction in force can be supported on several grounds. However, such a goal should not be allowed to rise to the level of a constitutional barrier preventing a public employer from voluntarily entering into a collective bargaining agreement that recognizes the need to accord special treatment to minority personnel so that past racial imbalances in staff composition do not once again become present reality.

State statutes in large part acknowledge that school boards should retain discretion in making layoff determinations and do not create entitlement to seniority rights.

Amicus has attached at Appendix A a state-by-state analysis of statutory provisions relating to reductions in force. Forty-one states have statutory

provisions which authorize school districts to employ reductions in force for a variety of specified reasons, such as decreased enrollment, reorganization, fiscal limitations or the elimination of a program or position. Of the statutes which authorize reductions in force, nineteen do not statutorily impose the order of dismissal or suspension when a reduction of personnel becomes necessary. The absence of restrictions in this regard clearly suggests that these state legislatures have left layoff decisions to the discretion of the local school boards.

The twenty-two states that do specify a particular layoff scheme that school boards must follow in reducing their faculties vary in the degree of statutory control they exert. Only seven states provide that teachers must be laid off in

reverse order of seniority, without indicating any possibility of variance. (Two of these states include in their layoff scheme a provision calling for nontenured teachers to be dismissed first). Three other states require school districts to follow a nontenured first rule in laying off teachers, without other restriction.

It should be noted that the imposition of a nontenured first rule does not restrict the school district's discretion in determining which nontenured teachers should be dismissed in the event of a reduction in staff levels and, once all nontenured teachers are dismissed, there is no restriction as to which tenured teachers should be dismissed first. In fact one state, Connecticut, provides that tenured personnel be dismissed according

to the terms of the collective bargaining agreement negotiated between the district and the teachers' union.

All of the remaining twelve states of the twenty two specifying a particular layoff system, allow the local school district to modify or deviate from the statutorily mandated layoff plan under certain circumstances or otherwise allow the districts to control the layoff policy.

Six states provide inverse seniority as the general order in which layoffs should be made (one includes a nontenured first rule as well) but specifically list instances where school districts may diverge from this pattern in order to satisfy special curriculum needs, equal protection considerations, collective bargaining terms or affirmative action

contract purposes.

Two states, Florida and Maine, explicitly require that layoff of teachers be controlled by the terms of a collective bargaining agreement. Maine's statute also contains a proscription against the use of seniority as the sole criterion for layoff. Oregon provides that layoff decisions be made on the basis of affirmative action needs, seniority and merit. The interests of the school system control the order in which teachers in Louisiance may be dismissed for reduction in force purposes. Finally, one legislature simply requires each school board to establish a written layoff policy.

Clearly, the states overwhelmingly prefer giving local school districts either total or partial control over

layoff determinations rather than restricting the order of suspension or dismissal to inverse seniority. As noted above, only seven of the fifty states and District of Columbia bind school districts to inverse seniority layoff schemes without permitting any variance. Even adding the other three states which require strict adherence to a nontenured first rule to this figure does not change the conclusion that the vast majority of state legislatures have not made seniority in public employment into a statutory bulwark impervious to the real need for discretion on the part of school boards to include race as a factor in making layoff decisions.

NSBA conducted a survey, for the purpose of the submission of this brief, of the membership of its Council of Urban

Boards of Education to elicit views as to the effect which reversal of the lower court decision would have on affirmative action efforts in the largest school districts in the country and to determine what criteria the boards use in making decisions on layoffs.

The Council of Urban Boards of Education was established by NSBA in 1967 to address the unique needs of school board members serving the largest cities of the United States. Its membership is composed of school boards in communities with a core-city population of least 100,000 persons.

Approximately 60% of the membership of the Council of Urban Boards responded to the NSBA survey. The names and enrollment of the districts which responded are listed in Appendix B. Those survey

respondents are responsible for the education of 5,188,025 children, which constitutes over 13% of the total student enrollment in elementary and secondary schools in the nation and over 50% of the minority student enrollment. Thus, the impact of the policies and practices of these districts on the education of the nation's children is significant.

Over two-thirds of the respondents to the survey have adopted voluntary affirmative action plans. Forty-one of the districts are parties to collective bargaining agreements, out of which 18 have affirmative action provisions. Thirty-seven districts have provisions relating to reductions in force in their affirmative action plan, their collective bargaining contract or a board policy. Twelve of the districts have provisions in

their plans or contracts which treat minorities differently for layoff purposes. Fourteen other districts treat minorities differently for the purpose of promotion or transfer. Four districts treat other groups of employees differently for the purpose of layoff, two exempt mathematics and science teachers from layoff and one exempts the head coach as well as requiring that the minority-majority ratio be maintained.

With reference to the head coach exemption, one wonders about the state of the law if a school board may take affirmative action to assure that the head coach is not laid off but may not take action to assure that an inordinate number of minority faculty members are not laid off.

III. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE ALL RACES TO BE TREATED THE SAME.

Although a court might not have the authority to require the school board to assure that the proportion of minority to majority teachers is maintained, the school board does and should have the authority to voluntarily agree with its teachers' union to maintain that proportion.

The concept of equality does not necessarily mean treating people the same. It is naive to believe that equality can be promoted without taking account of race. All things being equal, a "color blind" system may be the best system. But all things are not equal in a school system where treating all employees the same in a layoff situation would result in the dismissal of all or most of the

minority employees. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971).

Unfortunately this country is still suffering the results of massive discrimination against minorities and it will take more than court orders to remove those effects. Public and private employers alike must take voluntary affirmative efforts to eradicate discrimination from society, "root and branch." Green v. County School Board, 391 U.S. 430 (1968). There is no way that those efforts will be effective if employers are required to be "color blind."

This Court has noted that teachers should be assigned to schools in a manner that avoids creating the perception that a school is for whites only or for blacks

only. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971). Similarly, in the instant case what perception would have been created if the Petitioners' idea of "equality" had been put into place and teachers were dismissed on the basis of seniority? It does not require a study to reach the conclusion that dismissing most of the black teachers in the district would have a negative impact on black students.

Amicus endorses the discussion in Respondent's brief relating to the question of whether all distinctions based on race are "suspect" under the Equal Protection Clause. It may be true, as noted in the brief of Petitioners, that any distinction based on race might cause a certain amount of strife. However, that is not a reason to elevate all such

classifications to a level above other types of distinctions. One wonders if an art teacher would not be as upset over being laid off in favor of a head coach with less seniority than would a white teacher in the same situation with a black teacher. Layoffs cause controversy in whatever form they are made.

IV. SCHOOL BOARDS MAY CONSTITUTIONALLY MAKE RACE-CONSCIOUS EMPLOYMENT DECISIONS TO IMPLEMENT A POLICY THAT A RACIAL MIX IN THE DISTRICT'S FACULTY IS BENEFICIAL TO THE EDUCATION OF THE STUDENT BODY.

Petitioners disagree with the Jackson Board of Education's rationale in attempting to assure that the minority-majority ratio of teachers is not altered by the layoffs. Petitioners argue that there is no evidence to show that having black "role models" is necessarily beneficial to a black student's ability to

learn.

Psychological studies have shown that race and ethnicity are important factors in both the student-teacher relationship and the learning process. For example, research has shown that black and white teachers have markedly different academic expectations for their students, clearly favoring students of their own race when questioned as to which will achieve certain educational goals. Hendersen, E. and Long, B. Academic Expectancies of Black and White Teachers for Black and White First Graders. Proceedings of the 77th Annual Convention of the American Psychological Asssociation, Montreal, Canada 1973 Vol. 8, 687-688.

Studies have also shown that teachers direct different amounts and forms of praise and criticism towards students of

different races. Simpson, A. and Erickson, M. Teachers' Verbal and Nonverbal Communication Patterns as a Function of Teacher Race, Student Gender and Student Race. American Educational Research Journal, 1983 (Sum.), vol. 20(2), 183-198.

The majority of the respondents to NSBA's survey of its Council of Urban Boards of Education stated their belief that affirmative action in employment is an important tool in the education of all children, both black and white, and school boards should have as wide discretion as possible in developing voluntary plans. Some opined that it is particularly important to allow such provisions in collective bargaining agreements.

Following are some examples of policy statements on the subject of role models

and affirmative action which are contained in affirmative action plans submitted as a part of the NSBA survey:

- [I]t has been recognized by most educators within our pluralistic society, that school districts have an obligation to promote cultural, racial, and human understanding within the communities they serve. An effective method for this district of achieving this objective is to provide students with a district staff that is reflective of both sexes, as well as multi-ethnic and cultural characteristics of society.

- To provide in-depth education, the schools need to provide in the learning environment an opportunity for children to experience highly qualified representatives of all ethnic groups and cultures as part of their education since they need to learn to function in a pluralistic world.

- America is a land of diversity whose quality of character springs from the creativity, the toil, the intelligence and the struggles of individuals of all races and cultures. It is important, therefore, that all students

understand and appreciate that their world is built by the hands and minds of people who are from many national, religious, ethnic and cultural backgrounds. This understanding and appreciation is enhanced when students see members of their own ethnic groups in roles of inspirational leadership.

- [S]ome of our children are handicapped by being separated residentially and socially from the majority of the community's population by reason of their ethnic and economic background.

  [T]his separation...is rooted in causes which are far beyond the power of the schools alone to correct or eliminate; the cooperative efforts of all segments of the population and its agencies, public and private, are required.

  [T]he public schools, however, have the responsiblility to make every possible effort consistent with their educational responsibilities to minimize the effect of this separation among pupils. In this we are cognizant both of the handicap imposed on the child subjected to separation, and the fact that pupil groupings representative of a broad cross-section of all elements in the community is a desirable educational environment for all pupils involved.

> The minority student attending a school with a relatively high percentage of minority students [should have] available to him the positive image provided by a minority teacher, counselor and administrator.
>
> Minority students should be provided with employees of their own race whom they can recognize as examples of occupational achievement. The child from the majority group should have positive experiences with minority people which can be provided, in part, by having minority teachers, counselors and administrators where the enrollment is largely made up of majority group students. Majority students should be given an opportunity to be instructed by, and relate to, members of minority races in order to alleviate racial isolation.

There is a continuing argument among educators as to what makes children learn. And, education being more an art than a science, the debate will continue. However, whatever merit there is in either side of the argument as to whether

children learn better with a racially mixed faculty, that argument should not be fought in the courts.

As this Court has cautioned on several occasions, "courts lack the 'specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy'." Board of Education et al. v. Rowley, 102 S.Ct. 3034 (1982).

The issue here is not whether the school board was correct in its educational judgment that the students will be better served with a mixture of races on the faculty. That is not an issue which courts should attempt to resolve. The issue for the courts is whether, in order to meet its policy objectives, a board may constitutionally exempt minority faculty members from an

otherwise racially neutral scheme of layoffs in order to maintain a racial mixture.

If hiring decisions are made in a constitutional manner in the first instance, the school board may constitutionally elect to maintain the racial mix which resulted from the nondiscriminatory hiring.

Petitioners complain of what they call racial "preferences." As noted above, the Petitioners also misstate the issue in this case as being related to the hiring decisions made by Respondents. But the policy of maintaining the racial mix of the district in the event of the need to lay off teachers, is conceptually, and possibly constitutionally, different from a so-called "preference" of one race over another in hiring. Where an employer has,

through constitutionally valid affirmative action efforts, realized a goal of a particular minority-majority ratio, it would seem permissible for the employer to take steps to protect that ratio, even by the means of exempting minorities from layoff to the extent required to retain the existing racial proportion.

Amicus urges this Court not to overturn Jackson's layoff plan merely because of allegations in briefs that the hiring methodology was allegedly constitutionally infirm. It should be noted that first, there is no evidence that the hiring process was faulty, the lower court having expressly stated that it was not reaching that issue; and second, that the board used the student body ratio only as a "goal." There is no evidence that the Jackson Board hired

minority personnel in order to meet a quota or that it refused jobs tc whites solely because of their race. Race is a proper criterion for employment, if not used as the sole consideration and the use of goals in affirmative action plans has been expressly upheld by the courts.

Contractors Ass'n of Eastern Pa. v. U.S. Department of Labor, involved the question of whether the President had the authority to require federal contractors to establish goals and timetables to increase minorities in their workforces. The union plaintiffs argued that such a requirement was discriminatory and that the government did not have the authority to make such requirements in absence of a court finding of discrimination. The court held:

> "Even absent a finding tht the situation found to exist in the

> five-county area [low percentage of minorities] was the result of deliberate past discrimination, the federal interest in improving the availability of key tradesmen in the labor pool would be the same. While a court must find intentional past discrimination before it can require affirmative action under 42 U.S.C. section 2000e5(g), that section imposes no restraint upon the measures which the President may require of the beneficiaries of federal assistance." 442 F.2d 159, 175 (3rd Cir. 1971).

> "[T]he plaintiffs urge that the specific goals specified by the Plan [which requires the setting of goals and timetables for hiring of minorities] are racial quotas prohibited by the equal protection aspect of the Fifth Amendment...The Philadelphia Plan is valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. The Fifth Amendment does not prohibit such action...A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual

remedial action." at page 177.

But even assuming arguendo that, in absence of a court order, a school board cannot refuse to hire members of one race in order to reach a desired minority-majority ratio, it does not follow that an employer cannot constitutionally exempt from layoff members of one race in order to maintain a ratio which was achieved in a constitutional manner.

The entire argument of Petitioners is based on an assumption that there is only one reason for which a public employer may constitutionally exempt minorities from layoff. That reason, under Petitioners rationale, is when there has been a finding by a court that the particular employee exempted from layoff would have had seniority had the employer not

subjected the employee to discrimination on the basis of his or her race.

In order to accept that argument several assumptions must be made: first, that senior employees have a constitutional right to be laid off last and second, that an employer may not take race into account in setting criteria for the order of layoffs. Both assumptions are faulty.

Although it is true that a court may not order an employer to take race into account in the absence of a finding of discrimination, that is not the case with purely voluntary actions by the employer. Public school systems in particular should be allowed the latitude in making decisions as to who to lay off and who to retain, because they are charged with the heavy responsibility of assuring the

education of all children in the district and taking steps to make the process easier. In this case, the board has determined that to lay off teachers on a race neutral basis would result in the loss of minority teachers, to the detriment of the children. That would seem to be an appropriate decision for the board.

V. SCHOOL BOARDS SHOULD BE ALLOWED TO PROTECT THEMSELVES FROM DAMAGE SUITS UNDER SECTION 1983 BY TAKING CORRECTIVE ACTION WITHOUT A COURT ORDER.

This Court has on numerous occasions held that school boards have an affirmative duty to eliminate all effects of past discrimination and to assure the development of a unitary school system. See, e.g., Milliken v. Bradley, 433 U.S. 267 (1977); Green v. County School Boards, 391 U.S. 430 (1968); Louisiana v. United

States, 380 U.S. 433 (1965).

It is entirely conceivable that a court might agree with the board of education that at least one reason for the disproportionately low number of minority faculty members, before the board began affirmative efforts to increase that proportion, was because of past discriminatory action by a previous board of education. If this board has done nothing to rectify that discrimination, a court could order remedial efforts to begin immediately and, further, could hold the board liable in damages, under 42 U.S.C. 1983, and also award attorneys' fees under 42 U.S.C. 1988.

Yet, Petitioners argue that the board is unauthorized to make that determination itself and to take action on its own to assure that the positive gains in numbers

of minority faculty are not lost during the process of implementing a plan to reduce the labor force. Petitioners would have the board use a "color blind" scheme which would assuredly result in the loss of the majority of the black employees. Then the board would be called upon to sit back and wait for a court to hold its action discriminatory and order a damage award against the board. Surely the board should have the authority to make its own determination as to whether discrimination existed and, if so, the manner in which it should be addressed.

VI. CONCLUSION

On behalf of school boards across the country which are attempting to remove the effects of discrimination by their respective school districts, as well as by society at large, Amicus urges this Court not to tie their hands. School boards

should be allowed to use all available tools to assure each student in the school district an equal educational opportunity. Not all school boards are willing to adopt voluntary affirmative action plans, it being politically expedient, in many cases, to do nothing. But--where school boards take on the task voluntarily, the public and the courts owe a moral and constitutional duty to those boards to support their efforts.

Respectfully submitted,

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APPENDIX A

STATE STATUTORY PROVISIONS
SPECIFYING LAYOFF ORDER

State	Order of Layoff	*RIF Statute Citation
Alabama	None specified.	Code of Al. §16-24-8 (1977)
Alaska	None specified.	Ak. Stat. §14.20.175 (1984)
Arizona	None specified.	Az. Rev. Stat.Ann. §15-544 (1984)
Arkansas		None
California	Inverse seniority but deviations allowed to meet special needs or equal protection requirements	Ann.Calif. Educ.Code §44955(b), (d)(Supp. 1985)
Colorado	Nontenured first.	Co.Rev. Stat.§22-63-112(3) (1984)

* "Reduction in force"

State	Order of Layoff	RIF Statute Citation
Connecticut	Nontenured first. For tenured personnel, follow collective bargaining agreement or board policy.	Ct.Gen. Stat.Ann. §10-151(d) (Supp.1985)
Delaware	None specified.	Del.Code Ann.Tit.14 §1411(1981)
District of Columbia		None
Florida	Pursuant to terms of collective bargaining agreement; if none, board must prescribe RIF rules.	Fla.Stat. Ann.§231.36 (5)(Supp.) 1985)
Georgia	None specified.	Code of Ga. Ann.§20-2-940(a)(6) (1982)
Idaho	None specified.	Ida.Code §33-515 (Supp.1985)
Illinois	Nontenured first and inverse seniority but can deviate by collective bargaining or for affirmative action purposes.	Ill.Rev. Stat.122 §24-12 (1985)

State	Order of Layoff	RIF Statute Citation
Indiana	None specified.	Ind.Stat. §20-6.1-4-10(a)(5) (Supp.1984)
Iowa		None
Kansas		None
Kentucky	Inverse seniority.	Ky.Rev. Stat. §161.800 (1984)
Louisiana	Interests of the school system.	La.Opp. Atty. Gen. 1938-40 p. 1004.
Maine	Pursuant to negotiated agreement; may include but cannot be limited to seniority.	Me.Rev. Stat.Ann. Tit.20A §13201 (1984)
Maryland		None
Massachusetts	Nontenured first.	Mass.Gen.Laws Ann.71 §42 (1982)
Michigan	None specified.	Mich.Comp. Laws §38.105 (1982)

State	Order of Layoff	RIF Statute Citation
Minnesota	Inverse seniority but can deviate for affirmative action purposes.	Minn.Stat. §125.12 Subd.6b(d) (1984)
Mississippi		None
Missouri	Nontenured first and inverse seniority.	Rev.Stat.Mo. §168.291 (1984)
Montana	None specified.	Mt.Code Ann. §20-4-206(4) (1983)
Nebraska	Each board must adopt RIF policy which follows non-tenured first unless would cause noncompliance with federal or state affirmative action requirements.	Neb.Stat. §§79-1264.05, 79-1254.08 (1984)
Nevada	None specified.	Nev.Rev.Stat. §391,312(g) (1983)
New Hampshire		None
New Jersey	Inverse seniority.	NJ Stat.Ann. §18A:28-9 et seq.(1968)

State	Order of Layoff	RIF Statute Citation
New Mexico		None
New York	Inverse seniority.	Consol.Laws NY 16 Educ. Code §2855 (1981 & Supp. 1985)
North Carolina	None specified.	NC Gen.Stat. §115C 325(e) §(10(1983)
North Dakota	None specified.	ND Cent.Code §15-53.1-26.1 (2)(1982)
Ohio	Nontenured first & inverse seniority	Oh.Rev.Code §3319.17 (1980)
Oklahoma		None
Oregon	Pursuant to affirmative action policy of district but also seniority and merit.	Or.Rev.Stat. §342.943(3) (1983)
Pennsylvania	Inverse seniority but not to supersede or preempt collective bargaining agreement; however, teacher not a bargaining unit member retains seniority.	24 Pa.Stat. §11-1125.1 (Supp. 1985)

State	Order of Layoff	RIF Statute Citation
Rhode Island	Inverse seniority but can deviate where necessary to retain teachers of technical subjects whose places more senior teachers cannot fill.	Gen.Laws R.I. §16-13-6 (1981)
South Carolina		None
South Dakota	All boards must establish written staff reduction policies.	SD Cod.Laws §13-10-11 (1982)
Tennessee	None specified.	Tenn.Code Ann. §49-5-511(b)(1) (1983)
Texas	Inverse seniority.	Tex.Code Ann. §13.110 (Supp.1985)
Utah	None specified.	Ut.Code Ann. §53.51-8 (1982)
Vermont	None specified.	Vt.Stat.Ann. Tit.16 563 (12)(1976)
Virginia	None specified.	Code of Va. §22.1-304 (1980)

State	Order of Layoff	RIF Statute Citation
Washington	None specified.	Rev.Code Wa. §28A 67.070 (1984)
West Virginia	None specified	W.Va.Code §18A-2-2 (Supp.1985)
Wisconsin	Inverse seniority but can deviate by collective bargaining agreement.	Wi.Stat. §118.23(4), (5) (1984)
Wyoming	None specified.	Wyo.Stat.Ann. §21-7-111(a)(iv)(1977)

SUMMARY

Statutory Analysis	Number of States
Total surveyed.....	51
With RIF statute.....	41
No layoff order specified.....	19
Layoff scheme specified.....	22
• Nontenured first- no deviations allowed	3
• Nontenured first- deviations allowed....	1
• Inverse seniority- no deviations.....	5
• Inverse seniority- deviations allowed....	5
• Nontenured first & inverse seniority- no deviations.....	2
• nontenured first & inverse seniority- deviations allowed....	1
• Take account of affirmative action, seniority and merit.....	2
• Interests of the school district.....	1
• According to collective bargaining agreement..	2
• School board must establish layoff policy	1

APPENDIX B

COUNCIL OF URBAN BOARDS
OF EDUCATION

Respondents to Survey

School District	Enrollment
ALASKA	
Anchorage	40,560
CALIFORNIA	
Anaheim	11,610
Los Angeles	672,183
Oakland	49,348
San Diego	110,655
COLORADO	
Aurora	23,787
Pueblo	18,475
DISTRICT OF COLUMBIA	86,568
FLORIDA	
Dade County, Miami	223,854
Orlando	88,485
Tampa	108,871
GEORGIA	
Atlanta	67,317
ILLINOIS	
Chicago	420,000
INDIANA	
Indianapolis	54,070
South Bend	21,952

School District	Enrollment
IOWA	
Cedar Rapids	17,829
KANSAS	
Kansas City	23,013
Topeka	14,500
Wichita	44,512
KENTUCKY	
Louisville	92,000
LOUISIANA	
Baton Rouge	55,700
MARYLAND	
Baltimore	116,872
MASSACHUSETTS	
Boston	55,470
MICHIGAN	
Ann Arbor	14,376
Detroit	191,387
Flint	30,876
Grand Rapids	34,236
MINNESOTA	
St. Paul	32,000
MISSOURI	
Springfield	22,917
NEBRASKA	
Omaha	41,193
NEVADA	
Reno	31,500

School District	Enrollment
NEW JERSEY	
Newark	57,296
NEW MEXICO	
Albuquerque	75,336
NEW YORK	
New York City	925,000
NORTH CAROLINA	
Charlotte	71,946
Raleigh	54,506
OHIO	
Canton	13,693
Columbus	67,761
Toledo	43,327
OKLAHOMA	
Oklahoma City	38,632
Tulsa	46,178
OREGON	
Portland	50,800
Salem	22,500
PENNSYLVANIA	
Philadelphia	203,000
Pittsburgh	41,269
TEXAS	
Dallas	127,000
Fort Worth	63,143
Houston	183,873

School District	Enrollment
VIRGINIA	
Alexandria	10,000
Charlotte-Mecklenburg	71,946
Hampton	20,466
Norfolk	35,649
Portsmouth	18,500
Richmond	31,500
Virginia Beach	56,150
WASHINGTON	
Seattle	42,438

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No. 84-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WENDY WYGANT, *et al.*,
Petitioners,

v.

JACKSON BOARD OF EDUCATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF CONGRESSIONAL COALITION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the fourteenth amendment permits a school board and a teachers' association to agree to a provision in a collective bargaining agreement, designed to combat substantial underrepresentation of minority schoolteachers, which provides that in a layoff the percentage of minority teachers among teachers laid off shall not exceed the percentage of minority teachers then employed.

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NO. 84-1340

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JACKSON BOARD OF EDUCATION, et al.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF CONGRESSIONAL
COALITION IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE */

Amicus curiae are a bipartisan coalition comprised of the following

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*/ Consents of the parties to the filing of this brief have been obtained, and letters reflecting such consents are on file in the Office of the Clerk.

Members of Congress: The Honorable Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary; The Honorable Augustus F. Hawkins, Chairman of the Committee on Education and Labor; The Honorable James M. Jeffords, Ranking Minority Member of the Committee on Education and Labor; The Honorable John Conyers, Chairman of the Subcommittee on Criminal Justice of the Committee on the Judiciary; The Honorable Patricia Schroeder, Chair of the Subcommittee on Civil Service of the Committee on Post Office and Civil Service and Co-Chair of the Congressional Caucus for Women's Issues; The Honorable Pat Williams, Chairman of the Subcommittee on Select Education of the Committee on Education and Labor; The Honorable Barney Frank, Chairman of the Subcommittee on Employment and Housing of the Committee on Government Operations;

The Honorable Cardiss Collins, Chair of the Subcommittee on Government Activities and Transportation of the Committee on Government Operations; and The Honorable Norman Y. Mineta, Committee on Public Works and Transportation. The various congressional committees and subcommittees on which these Members serve are concerned with protecting civil rights and eliminating discrimination.

The issue in this case -- whether the fourteenth amendment permits the race-conscious remedial action taken by respondents -- is of vital interest to Congress. The fourteenth amendment expressly charges Congress with the duty and power to enforce the amendment. For more than a century Congress has sought to enforce the amendment and eliminate the tragic legacy of race discrimination by enacting effective remedial legislation. The use of appropriate

race-conscious legislation to combat race discrimination has proved to be effective and necessary.

Although this case does not directly address Congress' authority to remedy race discrimination, the manner in which this Court decides it may impinge upon Congress' ability to enforce the fourteenth amendment. We believe that to eliminate race discrimination -- one of the most serious social issues of our time -- a full range of remedies, including appropriate race-conscious actions, must remain available. We further believe that voluntary affirmative action by public, as well as private, employers is both constitutional and essential. In view of Congress' specific mandate to enforce the fourteenth amendment, the Coalition believes that its views will be of assistance to the Court in this case.

STATEMENT OF THE CASE

Amicus curiae adopt the facts as presented in the Brief for Jackson Education Association as Amicus Curiae Supporting Respondents at pages 4-23, and Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

Public employers and unions, like their private counterparts, may engage voluntarily in race-conscious affirmative action without violating the Constitution. This Court should therefore affirm the Sixth Circuit's ruling that Article XII, the race-conscious layoff provision adopted by the Jackson Board of Education and the Jackson Education Association as part of a collective bargaining agreement, is permissible

under the fourteenth amendment. However, if the Court reverses the judgment of the Sixth Circuit, we urge it to frame its instructions to the court below in a manner that does not constrict Congress' power to enforce the fourteenth amendment through appropriate race-conscious legislation.

In United Steelworkers of America v. Weber, this Court held that a voluntary, race-conscious affirmative action plan entered into by a private employer and the bargaining representative of the potentially affected employees did not violate Title VII. Although the employer in this case is public and thus subject to the fourteenth amendment as well as to Title VII, the Court should reach the same result here. Like the plan in Weber, Article XII is the product of collective bargaining, is a voluntary departure from the ordinary workings of

seniority, is designed to remedy the effects of the exclusion of blacks from a desirable occupation, and is both temporary and narrowly tailored.

To apply different standards to voluntary affirmative action undertaken by private and public employers would frustrate the clearly expressed intent of Congress. Congress extended the coverage of Title VII to the public sector in 1972, in part as an exercise of its fourteenth amendment powers. The legislative history of these amendments firmly establishes both Congress' approval of the use of race-conscious remedies subsequent to the passage of Title VII and its intent that the same principles and standards apply to private and public employers under Title VII. The Constitution does not require a different outcome.

This Court has upheld under the equal protection clause voluntary race-conscious affirmative action plans intended to remedy the present effects of past discrimination. Although the Court has not articulated an absolute constitutional standard to be applied to affirmative action efforts, Article XII passes constitutional muster even under strict scrutiny. Article XII was necessary to preserve the results of the Jackson school district's efforts to recruit and retain minority teachers -- efforts undertaken in response to the Board of Education's determination that blacks had been chronically underrepresented on the school district's teaching force. As part of a collective bargaining agreement subject to renegotiation, the provision is necessarily temporary. Since it was the result of the collective bargaining process, it does not interfere with the

settled expectations of affected white employees. Finally, its impact upon whites has been relatively light. Thus, Article XII is lawful under both Title VII and the fourteenth amendment.

Should this Court conclude that Article XII is not constitutionally permissible under the fourteenth amendment, however, we urge it to frame its ruling narrowly so as not to impair Congress' ability to attack through legislation the evils which the fourteenth amendment was designed to eradicate. Because of the number and diversity of its members, the broad scope of its fact-finding procedures and the relative absence of time pressures, Congress is well suited to engage in the complex social balancing that is required in this area. Moreover, because Congress is not bound to the case-specific inquiries characteristic of

the courts, it may conduct general fact-finding and enact remedies that reach beyond those available to a court adjudicating a particular controversy. It is these very characteristics that give rise to Congress' concern about the scope of the Court's ruling. A decision in this case that the fourteenth amendment requires findings of intentional discrimination or the identification of specific victims as a prerequisite to race-conscious remedial action would cripple Congress' ability to combat race discrimination.

Congress must be permitted to continue to draw appropriate inferences from the results of its own fact-finding process and to devise appropriate remedies based on these inferences. This Court has recognized that Congress' enforcement powers under section five of the fourteenth amendment are broad. For

more than a century Congress has enacted, pursuant to those powers, race-conscious remedies to redress race discrimination. This Court has repeatedly upheld such efforts, emphasizing that Congress' power to enact race-specific remedies exceeds that of the courts. Race-conscious legislation has made a significant difference in alleviating the consequences of race discrimination. However, the task is far from complete. We urge the Court to decide this case in a manner that preserves both the federal programs now in place and Congress' constitutional authority to resort to race-conscious remedial legislation in the future.

ARGUMENT

One hundred twenty years after the abolition of slavery race discrimination remains widespread. The cost of

continued racial isolation, in terms of lost talents, broken spirits and social strife, is intolerably high. This case presents the Court with the opportunity to decide whether public employers, like private employers, may adopt voluntary, race-conscious, affirmative remedies for past discrimination consistent with the Constitution. Because the use of such remedies is in accordance with congressional intent and the constitutional principles articulated in previous decisions of this Court, we believe the Court should uphold the race-conscious layoff provision jointly adopted by the Jackson Board of Education and the Jackson Education Association and affirm the decision of the Sixth Circuit in this case.

If the Court reverses the decision below, however, we urge the Court to

remain cognizant of the possible implications for Congress of any rulings concerning the scope of affirmative action permissible under the fourteenth amendment. That amendment charges Congress with the duty and power to enact appropriate legislation to combat race discrimination, and the broad discretion the amendment affords is essential to creating effective remedies for a problem which requires such complex social balancing. Therefore, we urge the Court, should it reverse, to narrowly tailor its ruling so as not to impair Congress' ability to enact race-conscious remedies pursuant to its fourteenth amendment powers.

Section One of this brief discusses the constitutionality of affirmative action by public employers and of the particular race-conscious layoff provision at issue in this case.

Section Two addresses Congress' fourteenth amendment powers, the characteristics which make Congress well suited to develop remedies in this area and Congress' particular interest in the scope of the Court's ruling in this case.

I. JACKSON'S RACE-CONSCIOUS LAYOFF PROVISION IS LAWFUL

A. Congress Intended that the Same Legal Standards Should Apply to Voluntary Affirmative Action Undertaken by Public and Private Employers and this Intent Is in Accordance with the Constitution

This Court has recognized that when Congress extended Title VII[1/] coverage to public employers in 1972,[2/] it "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers

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1/ 42 U.S.C. §§ 2000e et seq. (1982).

2/ Pub. L. No. 92-261 (1972).

alike."[3/] At the time these amendments were enacted, Congress expressed its approval of the race-conscious affirmative action remedies devised by the courts.[4/] Congress also rejected

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3/ Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977). See also Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir.), cert. denied, 446 U.S. 917 (1979).

4/ Both the House and Senate reports cited with approval judicial decisions upholding affirmative action. See S. Rep. No. 415, 92d Cong., 1st Sess. 8 n.4 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 5 n.1 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2141. The House report explicitly stated that "[a]ffirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." Id. at 16, 1972 U.S. Code Cong. & Ad. News at 2151.

Affirmative action guidelines issued by the Equal Employment Opportunity Commission recognize "the clear Congressional intent to encourage voluntary affirmative action" and reiterate the Commission's belief "that by the enactment of Title VII Congress did not intend to expose those who comply

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amendments to Title VII which would have precluded the use of race-conscious measures under Executive Order 11246 or the 1964 Civil Rights Act.[5/] This clearly expressed intent of Congress in favor of affirmative action by public as well as private employers would be frustrated if the Court holds that more stringent standards apply to public employers under Title VII and the fourteenth amendment than apply to

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(Footnote 4 continued)

with the Act to charges that they are violating the very statute they are seeking to implement." 29 C.F.R. § 1608.1 (1984). This Court has noted that the EEOC Guidelines, as the administrative interpretation of Title VII by the enforcing agency, are "entitled to great deference." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)).

5/ See 118 Cong. Rec. 4918 (1972).

private employers under Title VII alone.[6/]

In United Steelworkers of America v. Weber,[7/] this Court upheld under Title VII a voluntary, race-conscious affirmative action plan collectively bargained by a private

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6/ Courts confronting the range of race-conscious remedial action undertaken by public employers have concluded, expressly or impliedly, that a public employer which adopts a voluntary affirmative action plan valid under Weber will be insulated from Title VII liability. See, e.g., Johnson v. Transportation Agency, 36 Fair Empl. Prac. Cas. (BNA) 725, 729 (9th Cir. 1984); Kromnick v. School District, 739 F.2d 894, 911-12 (3d Cir. 1984), cert. denied, 105 S. Ct. 782 (1985); Bratton v. City of Detroit, 704 F.2d 878, 884 (6th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984).

Voluntary affirmative action by public employers has also been upheld against challenges based on the equal protection clause of the fourteenth amendment. See, e.g., Kromnick v. School District, 739 F.2d at 908-09; Valentine v. Smith, 654 F.2d 503, 511 (8th Cir.), cert. denied, 454 U.S. 1124 (1981).

7/ 443 U.S. 193 (1979).

employer and the bargaining representative of the potentially affected employees. The objective of the plan was to increase the level of black representation in the employer's craft force until it equalled the percentage of blacks in the labor force. The method used to achieve this objective was to reserve for blacks one-half of the places in a special training program. Although seniority was a factor in the allocation of places in the training program, separate lists of black and white workers were maintained. As a result, some white workers denied admission to the program had more seniority than some of the black workers admitted. Recognizing that the plan was adopted "to eliminate traditional patterns of racial segregation,"[8/] the Court concluded that Title VII

8/ Id. at 201.

permits employers and unions to agree to such temporary measures to eliminate manifest racial imbalances in traditionally segregated job categories.[9/]

Practical and equitable considerations played a primary role in the Court's decision in Weber. The result was necessary to insure the effective operation of Title VII, with its emphasis on voluntary action without litigation. It was also necessary to shield employers from the dilemma of choosing between liability to blacks for past discrimination on the one hand, and liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks on the other.[10/]

9/ Id. at 207.

10/ See id. at 209-10 (Blackmun, J., concurring).

The Court's recent decision in Firefighters Local Union No. 1784 v.

(Continued)

Many of the characteristics and purposes of the Kaiser-USWA plan upheld in Weber are similar to those of Article XII, the layoff provision challenged in this case.[11/] The Kaiser-USWA plan, like

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(Footnote 10 continued)

Stotts, 104 S. Ct. 2576 (1984), does not overrule Weber. Stotts simply extended the Court's holding in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) -- that a court may award competitive seniority only to individual victims of past discrimination -- to judicial modification of a consent decree to require race-conscious layoffs over the objections of a union. Stotts has no application to voluntary affirmative action which is the product of a negotiated agreement between an employer and a union.

11/ This layoff provision was first adopted by the parties in Article XII of their 1972 collective bargaining agreement. For clarity, it is referred to throughout this brief as Article XII.

Article XII, was the product of collective bargaining.[12/] Both plans deviated from the ordinary workings of seniority.[13/] Both plans were designed to remedy the effects of the exclusion of blacks from desirable occupations.[14/] Just as minority employees had no absolute right to advancement under the Kaiser-USWA plan, minority teachers have no absolute right to protection from layoffs under Article XII.[15/] Finally,

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12/ See Weber, 443 U.S. at 197-99; Wygant v. Jackson Board of Education, 746 F.2d 1152, 1158 (6th Cir. 1984).

13/ See Weber, 443 U.S. at 199; Wygant, 746 F.2d at 1154.

14/ See Weber, 443 U.S. at 198 & n.1; Wygant, 746 F.2d at 1156-57.

The Jackson plan had the additional purpose of retaining black teachers in active service in order to benefit students in the Jackson public schools. See 746 F.2d at 1157.

15/ See Weber, 443 U.S. at 208; Wygant, 746 F.2d at 1154.

both were narrowly tailored, temporary measures. In Weber, the race-conscious selection of black trainees for the craft training program was to cease when the level of blacks in skilled crafts was comparable to black availability in the labor force.[16/] In this case, Article XII is a temporary response to the dislocation caused by a period of fiscal austerity. As the district court found, Article XII is "part of a collectively-bargained contract of limited duration" which is "subject to change whenever the contract is renegotiated."[17/]

There is a significant difference between the plan at issue in Weber and Article XII, however. Weber involved a private employer and was decided solely

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16/ See Weber, 443 U.S. at 208-09.

17/ Wygant, 546 F. Supp. 1195, 1202 (E.D. Mich. 1982).

under Title VII. The Jackson Board of Education is a public employer; consequently, both the equal protection clause of the Constitution and Title VII are implicated in this case. Nonetheless, Article XII, like the Kaiser-USWA plan, is lawful.

As noted above, in amending Title VII in 1972 to extend coverage to public employers, Congress intended that the same legal standards apply to affirmative action undertaken by public and private employers.[18/] At least in this case, the Constitution requires no different result. Consistent with the principles set forth in this Court's earlier decisions, race-conscious remedial measures like Article XII are permissible under the Constitution.

18/ See notes 1-3 supra and accompanying text.

In Fullilove v. Klutznick, seven members of the Court recognized that the equal protection clause permits voluntary, race-conscious[19/] affirmative

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19/ The argument advanced by the Solicitor General that the equal protection clause has always been strictly color-blind, see Brief for the United States as Amicus Curiae Supporting Petitioners at 7-21, simply cannot be squared with the history of the fourteenth amendment. As Dean Ely has explained:

> [T]he express preoccupation of the framers of the [fourteenth] amendment was with discrimination against Blacks, that is, with making sure that Whites would not, despite the thirteenth amendment, continue to confine Blacks to an inferior position. That this is the amendment's history surely cannot conclude the matter; given the historical context, discrimination against Blacks is all the framers would have been concerned about, and the equal

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action to remedy present effects of past discrimination.[20/] Remedying the present

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(Footnote 19 continued)

> protection clause has rightly been construed to protect other minorities. But at the same time, the amendment cannot be applied without a sense of its historical meaning and function.

Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 728 (1974) (footnotes omitted).

This Court has recognized, in the public school setting, that "color-blindness" can be exploited as a pretext to justify continued discrimination. See North Carolina State Board of Education v. Swann, 402 U.S. 43, 45-46 (1971).

20/ 448 U.S. 448, 482 (1980) (Burger, C.J.) (citing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18-21 (1971)); Fullilove, 448 U.S. at 519-21 (Marshall, J., concurring in judgment); id. at 548 (Stevens, J., dissenting). Cf. Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982) (O'Connor, J.) (gender classifications are permissible under fourteenth amendment).

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effects of past race discrimination, like "making whole" identified victims of discrimination, is a constitutionally permissible objective of state action.[21/]

(Footnote 20 continued)

Although Fullilove considered the validity of congressional action and therefore turned on the Court's analysis of this action under the equal protection component of the fifth amendment, 448 U.S. at 473, its constitutional analysis is fully applicable to state action under the fourteenth amendment. See Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam); Regents of the University of California v. Bakke, 438 U.S. 265, 367-69 (1978) (Brennan, White, Marshall, Blackmun, JJ.) (same equal protection standards should apply to states as apply to Congress).

21/ Fullilove, 448 U.S. at 477 (Burger, C.J.) (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966)); see also United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Stotts, 104 S. Ct. at 2606 (Blackmun, J., dissenting) ("Because the discrimination sought to be alleviated by race-conscious relief is the classwide effects of past discrimination, rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members.").

Such relief is not limited to remedying adjudicated constitutional violations.[22/] It may impinge upon the settled expectations of "innocent parties" whether or not the affected whites oppose the remedy.[23/] The whites affected need not themselves have been guilty of discrimination.[24/] In fact, it may reasonably be assumed that some or all of those adversely affected by the remedial action previously benefited from their non-minority status.[25/]

22/ Fullilove, 448 U.S. at 477 (Burger, C.J.) (citing Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966)); see also Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16.

23/ See Fullilove, 448 U.S. at 484 (Burger, C.J.).

24/ See id. at 484-85.

25/ See id. at 485.

The Court has not articulated absolute standards for assessing the validity of racial classifications utilized by public employers as part of race-conscious affirmative action plans intended to remedy past discrimination.[26/] However, whether the standard to be applied is the "strict scrutiny" applied to invidious racial classifications or something less, the constitutionality of race-conscious state action is to be determined by a two-step analysis.[27/] First, it must be decided whether the objective of the action -- in this case, remedying past discrimination[28/] -- is constitutionally

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26/ See id. at 498 (Powell, J., concurring).

27/ See id. at 473 (Burger, C.J.).

28/ A formal judicial or administrative "finding" of discrimination is not required before such a classification can be employed. Id. at 477, 478 (Burger,

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permissible. The second step is to determine whether the means chosen to

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C.J.) (citing Katzenbach v. Morgan, 384 U.S. at 652-53) (upholding benign racial classification employed by Congress because "the Court could perceive a basis upon which Congress could reasonably predicate a judgment" that discrimination had occurred)). Stotts does not alter the application of that rule to this case. In Stotts, the Court held that under Title VII a district court modifying a consent decree may not alter a bona fide seniority system to require race-conscious layoffs without a finding or admission that each beneficiary has been a victim of past discrimination. 104 S. Ct. at 2590. That holding does not reach voluntary affirmative action efforts jointly agreed upon by the same employer and union which established the seniority principles to be modified. Nor is a specific finding required as to intent. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The requirement that there be a judicial or administrative finding of discrimination before a public employer can adopt a race-conscious remedy would, as in the private setting, undermine the administration of the anti-discrimination laws, which are predicated on voluntary settlement short of litigation. See, e.g., Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). See also 29 C.F.R. § 1608.1 (1984).

attain the objective -- here, a race-conscious layoff provision -- are constitutional. There are, of course, constitutional limitations on the power of a public employer to engage in voluntary affirmative action employing racial classifications. Any such race-conscious programs must, as in the private setting, be temporary,[29/] narrowly tailored, and designed to eliminate racial imbalances rather than to maintain racial balance.[30/]

29/ See Fullilove, 448 U.S. at 463 (Burger, C.J.) (Affirmative action will be needed until society delivers upon "the century-old promise of equality of economic opportunity."); see also Regents v. Bakke, 438 U.S. at 405 (Blackmun, J., dissenting) (noting the tension between the fourteenth amendment's "original intended purposes" of aiding blacks and "idealistic equality" for all, which will remain "until complete equality is achieved"); Ely, supra note 19, at 738-39; cf. A. Bickel, The Least Dangerous Branch 64-65 (1962).

30/ See Weber, 443 U.S. at 209.

B. Article XII Is a Constitutionally Permissible Racial Classification

Analyzed in light of these principles, Article XII is constitutional. First, the purpose of Article XII was to preserve the results of recent efforts to recruit and retain minority teachers in the Jackson schools. These efforts were undertaken in response to the Board of Education's determination that blacks had been chronically underrepresented on the school district's teaching force.[31/] In the face of

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31/ See 746 F.2d at 1156. The statistics relied upon by the Board of Education led both lower courts in this case to conclude that "minority teachers were 'substantially' and 'chronically' underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan." Id.

layoffs which would otherwise be conducted according to ordinary seniority rules, there is no way to preserve the results of affirmative action hiring efforts without adopting a race-conscious layoff plan;[32/] Article XII was therefore necessary. A finding that Article XII is unconstitutional would mean that fiscal austerity would prevail over voluntary affirmative action despite the willingness of the teachers' association and the Board of Education temporarily to deviate from normal seniority principles in order

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32/ See generally Arthur v. Nyquist, 712 F.2d 816 (2d Cir. 1983) (approving race-conscious layoff plans designed to preserve gains made pursuant to court-ordered affirmative action), cert. denied, 104 S. Ct. 1907 (1984); accord Morgan v. O'Bryant, 671 F.2d 23 (1st Cir.), cert. denied, 459 U.S. 827 (1982).

to preserve the essential gains derived from affirmative action.[33/]

Second, the interests of non-minority teachers have not been unreasonably trammelled by the workings of Article XII. Although at least one white teacher laid off because of the challenged provision would not have been laid off in its absence,[34/] the impact of Article XII on whites can fairly be characterized as "relatively light."[35/] This

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33/ Despite the ambiguity of the opinion of the district court on this point, see 546 F. Supp. at 1202, Article XII does not seek to establish or maintain any particular ratio between the number of minority teachers and the number of minority students.

34/ See Wygant, 746 F.2d at 1157.

35/ See Fullilove, 448 U.S. at 484 (Burger, C.J.).

Moreover, the layoff provision is not an absolute shield against minority layoffs. So long as minority representation among teachers laid off does not exceed minority representation on the

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Court has recognized that, "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible."[36/]

Third, Article XII is an appropriately temporary measure. It does not provide indefinite protection for minority teachers at the expense of non-minority teachers; rather, it operates solely to preserve the gains of recent hiring of minority teachers in the face of economically mandated layoffs. It is part of a collective bargaining agreement subject to renegotiation. There is good

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(Footnote 35 continued)

faculty, minorities and whites share the impact of fiscal austerity. See Arthur v. Nyquist, 712 F.2d at 823-24.

36/ Fullilove, 448 U.S. at 484 (Burger, C.J.) (citations omitted).

reason to believe that neither the teachers' association nor the school board would propose to include Article XII in future collective bargaining agreements once the minority hiring gains are substantial enough and extend far enough back in time that they can no longer be eroded easily by layoffs.

Additional factors weigh in favor of affirmance. First, because Article XII was collectively bargained by the public employer and the bargaining representative of all the potentially affected employees, it does not interfere with the settled expectations of non-minority employees.[37/] Moreover, the seniority rights of teachers adversely affected by the operation of Article XII, while valuable and important,[38/] are not

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37/ Cf. Stotts, 104 S. Ct. 2576 (1984).

38/ See id. at 2583 n.4.

sacrosanct. Like other assets and economic interests they are subject to the give and take of collective bargaining.[39/] The Ninth Circuit has held that Title VII is not violated when an employer and a union voluntarily agree to a layoff provision that favors minority employees in order to preserve recent gains made in minority hiring.[40/] The same reasoning should apply in this case.

Finally, it is significant that the public employer in this case is a public school board. As the Court noted in Brown v. Board of Education,[41/] "education is perhaps the most important

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39/ See Ford Motor Co. v. Huffman, 345 U.S. 330, 342 (1953).

40/ Tangren v. Wackenhut Services, Inc., 26 Fair Empl. Prac. Cas. (BNA) 1647 (9th Cir. 1981), cert. denied, 456 U.S. 916 (1982).

41/ 347 U.S. 483 (1954).

function of state and local governments."[42/] This special importance of public education has led the Court repeatedly to acknowledge the competence

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42/ Id. at 493. Congress has also recognized the critical place of public education among local government functions. The House report on the 1972 amendments to Title VII noted:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated.

H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971) (emphasis added), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2153. See also S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971) (declaring that the exclusion of minorities from effective participation in state and local employment "not only promotes ignorance of minority problems in the particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government").

of public educational authorities to engage in appropriate race-conscious affirmative action in the furtherance of educational policy.[43/]

43/ See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); McDaniel v. Barresi, 402 U.S. 39, 41 (1971); North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971). In Swann a unanimous Court, through the Chief Justice, stated that public school authorities may consider race in the assignment of faculty and students in the exercise of their "broad power to formulate and implement educational policy." 402 U.S. at 16. The Court further noted that the "discretionary" power of school boards to take such race-conscious steps greatly exceeds the authority of the courts to implement similar measures; courts can do so only after the finding of a constitutional violation. Id. Cf. Regents v. Bakke, 438 U.S. at 310-11 (Powell, J.) (the governmental interest in providing health care to disadvantaged communities may justify race-conscious admissions program at state medical school); NAACP v. Beecher, 679 F.2d 965, 977 (1st Cir. 1982), vacated on other grounds, 461 U.S. 477 (1983) (effective police protection

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II. IF THE COURT REVERSES THE SIXTH CIRCUIT, THE FOURTEENTH AMENDMENT SHOULD NOT BE INTERPRETED IN A WAY THAT WOULD CONSTRICT CONGRESS' POWER TO ENFORCE THE EQUAL PROTECTION CLAUSE

Although this case does not directly address Congress' authority, if the Court reverses the Sixth Circuit's ruling the decision may nonetheless

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(Footnote 43 continued)

requires racially balanced police force); accord Detroit Police Officers' Association v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

Contrary to the argument of the United States, Brief of the United States as Amicus Curiae Supporting Petitioners at 29-30, Fullilove does not hold that Congress is the only governmental body constitutionally competent to make a finding that justifies the use of racial classifications for remedial purposes. Not only does this argument disregard decisions of this Court such as Swann v. Charlotte-Mecklenburg, but, as a practical matter, such a reading of Fullilove would virtually extinguish voluntary affirmative action by school boards and the many other state and local

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affect Congress' ability to confront creatively the evils that the fourteenth amendment was designed to eradicate. For example, a holding that the use of race-conscious remedies under the fourteenth amendment must be predicated on victim-specific findings of discrimination would severely curtail the power of Congress to combat race discrimination, since the legislative process is not well suited to engage in such individualized determinations.

(Footnote 43 continued)

government entities. For example, in 1982 there were nearly 15,000 school districts in the United States. Statistical Abstract of the United States 283 (105th ed. 1985). Congress cannot alone undertake all of the race-conscious actions which may be needed to remedy past discrimination in these thousands of school districts, thereby averting litigation.

We, the legislators who write here as amicus curiae, believe that Article XII is a constitutionally permissible use of a race-conscious remedy, consistent with the goals of both the equal protection clause and federal equal opportunity laws. If this Court concludes, however, that Article XII is impermissible under the fourteenth amendment, we urge the Court to circumscribe its ruling to the facts of this case so as not to impair Congress' enforcement powers under section five of the amendment.

A. The Court Has Interpreted Section Five of the Fourteenth Amendment as a Broad Grant of Plenary Power

Section five of the fourteenth amendment confers upon Congress the power to enforce the provisions of the amendment "by appropriate legislation." The

Court has held that this enabling clause gives Congress the same broad powers recognized under the necessary and proper clause of the Constitution[44/] to enforce the amendment's prohibitions against race discrimination.[45/] In Fullilove v. Klutznick,[46/] the Court upheld congressional authority to enact a race-conscious minority set-aside provision and reaffirmed that section five is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the

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44/ See Katzenbach v. Morgan, 384 U.S. at 650 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

45/ Oregon v. Mitchell, 400 U.S. 112, 127 (1970) ("To fulfill their goal of ending racial discrimination . . . the Framers gave Congress power to enforce each of the Civil War Amendments. These enforcement powers are broad.").

46/ 448 U.S. 448 (1980).

guarantees of the fourteenth amendment."[47/]

B. Congress Has Repeatedly Enacted Race-Conscious Remedies Pursuant to Its Powers Under Section Five and the Court Has Found These Enactments to Be Constitutional

For more than a century Congress has been committed to combatting race discrimination through the use of race-conscious legislation. The legislative history of the fourteenth amendment indicates that the amendment's framers envisioned just such a role for Congress.[48/] Prior to consideration of the fourteenth amendment, the same Congress that proposed the amendment

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47/ Id. at 476 (quoting Katzenbach v. Morgan, 384 U.S. at 651).

48/ See generally Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 1 (1985).

passed a series of race-specific social welfare programs. Of even greater significance, Congress passed the most comprehensive of these statutes, the Freedmen's Bureau Act of 1866,[49] just one month after it approved the fourteenth amendment.[50]

The 1866 Freedmen's Bureau Act is a good example of race-conscious remedial legislation. The Act provided for educational programs expressly limited to "freedmen."[51] In the earliest of the Freedmen's Bureau Acts, the 1864 Act, the House defined the beneficiaries

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49/ Act of July 16, 1866, ch. 200, 14 Stat. 173, 174-76.

50/ The House approved Senate changes to the amendment on June 13, 1866 and voted it into law. Cong. Globe, 39th Cong., 1st Sess. 3149 (1866). The Conference Report on the Freedmen's Bureau Act was accepted on July 2 and 3, 1866. Id. at 3562.

51/ 14 Stat. 174-76.

of the bill as "persons of African descent,"[52] while the Senate referred to "such persons as would have once been slaves."[53] Many of the Act's provisions were aimed at black farmers, the most important group of minority entrepreneurs at the time. It is not likely that the 39th Congress intended the fourteenth amendment, enacted in July 1866, to invalidate race-conscious remedial action when the same Congress passed the Freedmen's Bureau Acts in February and July 1866.

In recent decades Congress has continued to enact race-conscious legislation aimed at eradicating race discrimination and its consequences. In

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52/ Cong. Globe, 38th Cong., 1st Sess. 2801 (1864).

53/ Id. at 2798.

Fullilove v. Klutznick,[54/] this Court recognized such legislation to be consistent with the requirements of the equal protection clause.

Plaintiffs in Fullilove challenged the constitutionality of the Minority Business Enterprise (MBE) provisions of the Public Works Employment Act of 1977,[55/] which requires state and local recipients of federal grants for local public works projects to use at least ten percent of these funds to purchase supplies or services from minority-owned businesses. Six members of the Court held that the use of racial and ethnic criteria constituted a valid means of enforcing the fourteenth amendment.[56/]

54/ 448 U.S. 448 (1980).

55/ 42 U.S.C. §§ 6701 et seq. (1982).

56/ Justices White and Powell joined in the majority opinion authored by Chief

(Continued)

The Chief Justice, joined by Justices White and Powell, expressly "reject[ed] the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."[57/] The Chief Justice further noted that the Court had repeatedly refused to deny the lower courts the power to employ race-conscious factors in fashioning equitable remedies for unconstitutional race discrimination or violations of federal anti-discrimination statutes.[58/]

(Footnote 56 continued)

Justice Burger. Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment, concluding that the challenged legislation was "plainly constitutional." 448 U.S. at 519.

57/ Id. at 482.

58/ In the school desegregation area, for example, the Court has observed that because of the race-related nature of the initial violation, race must be considered in devising any meaningful remedy. See North Carolina State Board of

(Continued)

In Fullilove the Court upheld the constitutionality of the use of race-specific remedies by the judicial and legislative branches. In this regard the Chief Justice noted that Congress, as the branch entrusted with enforcement of the fourteenth amendment, has even more far-reaching power than the courts to remedy discrimination:

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in

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(Footnote 58 continued)

Education v. Swann, 402 U.S. at 46 (Burger, C.J.) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."); McDaniel v. Baressi, 402 U.S. 39, 41 (1971).

> Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.59/

In addition to the MBE provision upheld in Fullilove, Congress has enacted a host of other legislation, pursuant to its authority to enforce the fourteenth amendment, that is either expressly race-conscious or that is applied through race-conscious administrative regulations.60/ Title VII of

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59/ 448 U.S. at 483.

60/ See, e.g., Small Business Act, 15 U.S.C. § 637(d)(1982), and accompanying regulations, 13 C.F.R. §§ 124.1-1 to .3-1 (1985) (setting eligibility requirements for participation in program regarding contracts for federal agencies); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1982), and accompanying regulations, 29 C.F.R. §§ 1607.11, 1607.13, 1607.17 (1984) (employers may be required to use race-conscious affirmative measures to eliminate discrimination); Energy Conservation and Production Act of 1974, 42 U.S.C. § 6870 (1982), and accompanying regulations, 10 C.F.R. § 1040.7(a),

(Continued)

the Civil Rights Act of 1964[61/] is a vivid example. In 1972 Congress comprehensively revised Title VII[62/] and extended its coverage to state and local governments in part as an exercise of its powers under section five.[63/] The

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(Footnote 60 continued)

(c)(3) (1985) (grant recipients to take remedial steps to eliminate effects of discrimination arising from former policies); Cable Communications Policy Act of 1984, 47 U.S.C.A. § 554(c) (1985 Supp.) (imposing obligation to execute positive, continuing program of affirmative action).

61/ 42 U.S.C. §§ 2000e et seq. (1982).

62/ Pub. L. No. 98-549, 98 Stat. 2779 (1984).

63/ Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), recognized that Congress' power to enact the race-conscious amendments to Title VII in 1972 derived from section five of the fourteenth amendment:

> There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised

(Continued)

legislative history of these amendments evidences congressional approval of affirmative action programs and

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(Footnote 63 continued)

> its power under § 5 of the Fourteenth Amendment.

Id. at 453 n.9.

The legislative history also indicates that Congress was invoking its power under section five when it passed the 1972 amendments. The Senate report accompanying the bill that eventually became the amendments states:

> The last sentence of the Fourteenth Amendment enabling Congress to enforce the Amendment's guarantees by appropriate legislation is frequently overlooked, and the plain meaning of the Constitution allowed to lapse. The inclusion of State and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the "appropriate legislation" to insure that all citizens are treated equally in this country.

S. Rep. No. 415, 92d Cong., 1st Sess. 11 (1971).

congressional intent that such programs would be used to combat discrimination.[64/] Congress recently reaffirmed its commitment to race-conscious affirmative action when it passed the Cable Communications Policy Act, which was signed into law by President Reagan in October 1984.[65/] This Act contains comprehensive equal employment opportunity requirements and provides specific obligations that will be imposed on the

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64/ The House report accompanying the bill that became the 1972 amendments states:

> [A]ffirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination.

H.R. Rep. No. 238, 92d Cong., 1st Sess. 16 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2151.

65/ Pub. L. No. 98-549, 47 U.S.C. §§ 521 et seq. (1982).

cable industry to "execute a positive continuing program of specific practices" to affirmatively recruit, hire and promote women and minorities.[66/]

All the statutes discussed above have in common the race-based nature of their remedies. Each reflects the studied judgment of Congress as to how to respond most effectively to the particular problem addressed. Congress' mission to rectify past discrimination through such tailored remedies could be severely hampered if the Court unduly narrows the range of remedies permissible under the fourteenth amendment.

66/ 47 U.S.C.A. § 554(c) (Supp. 1985).

C. Congress Is the Branch Entrusted with Enforcing the Fourteenth Amendment and Is Well Equipped to Combat Discrimination

The framers of the fourteenth amendment "were primarily interested in augmenting the power of Congress, rather than the judiciary."[67/] Indeed, as the Chief Justice observed in Fullilove, the authority of Congress to employ race-conscious remedies exceeds that of the judicial branch.[68/]

When Congress contemplates enactment of a remedy, it is not subject to the same time pressures that the courts face. This is an extremely important consideration where race

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67/ Katzenbach v. Morgan, 384 U.S. 641, 648 n.7 (1966).

68/ 448 U.S. at 483. See also Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16.

discrimination remedies are concerned because of the intricate social balances involved. Meaningful remedies for race discrimination often create corresponding burdens. Congress, as a representative body, is ideally situated to make such determinations. The Court has noted that Congress can avail itself of certain fact-finding procedures that are not available to the courts.[69/] As former Solicitor General Archibald Cox has observed:

> [T]he legislature is, or at least can be a better fact-finding body than an appellate court. The greater number of members and their varied backgrounds and experience make it virtually certain that the typical legislature will command wider knowledge and keener appreciation of current social and economic conditions

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69/ See Bush v. Lucas, 462 U.S. 367, 389 (1983).

than will the typical court.70/

In sum, not only does the fourteenth amendment charge Congress with enforcing the amendment, but, as a practical matter, Congress is particularly well suited to undertake this task. It is therefore critical that if the Court reverses the decision below, it refrain from deciding this case in a way that would impair Congress' power to implement the equal protection clause.

D. Congress' Authority Under Section Five Would Be Nullified if the Fourteenth Amendment Were Interpreted to Require Individualized Determinations of Past Discrimination

In addition to the essential differences between Congress and the

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70/ Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199, 209 (1971).

judiciary discussed above, there is another key distinction: Congress acts on a level of generality, rather than on the case-specific basis characteristic of the judiciary. Consequently, Congress may conduct general fact-finding and enact legislation that reaches substantially beyond what a court would do when faced with a particular controversy. These differences in the scope of congressional and judicial remedies are grounded in the constitutional definitions of the roles of each branch.

In light of these inherent differences, a decision by the Court that the fourteenth amendment requires specific findings of discrimination and the singling out of identifiable "victims" before race-conscious remedies can be implemented would cripple the legislature's ability to combat race

discrimination.[71] Congress is not equipped to make victim-specific findings of discrimination. Rather, Congress can take into account judicial principles, and the results of its own fact-finding processes, and draw inferences of its own from such evidence as statistical disparity or racial imbalance. Congress should be permitted ample latitude to confront the evils of race discrimination in order to fulfill its constitutional obligation to enforce the equal protection clause.

71/ The United States in its brief as amicus curiae suggests that the Court should construe Fullilove to permit the use of race-conscious remedies only to provide specific relief to identified victims of discrimination. See Brief for United States as Amicus Curiae Supporting Petitioners at 30. As the foregoing discussion demonstrates, that reading of Fullilove misinterprets the Court's decision. Such an interpretation would effectively overrule that decision and tie Congress' hands in its attempts to enforce the equal protection clause.

E. Although Congress Has Made Progress Toward Achieving the Goals of the Equal Protection Clause, Much Remains to Be Done

Although the ultimate goal of the fourteenth amendment is indeed a color-blind Constitution, it has long been recognized that race-conscious remedial action is necessary to achieve equal opportunity. Although significant gains have been achieved in recent decades, much more must be accomplished before the 120 year-old promise of equal protection is fulfilled. A report published in 1984 by The Potomac Institute,[72] after an extensive study of the patterns of minority and female employment in the 1970's, concluded that "both

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72/ The Potomac Institute, A Decade of New Opportunity: Affirmative Action in the 1970s (1984). The report was written by Herbert Hammerman, formerly Chief of the Employment Surveys Division of the Equal Employment Opportunity Commission.

minorities and women had greater employment in higher-paid jobs, where they traditionally had been under-represented . . . . [T]he gains . . . for the first time represent a good start in the direction of equal employment opportunity."[73/] Significantly, the study determined that affirmative action was instrumental in bringing about these gains.[74/]

The progress achieved thus far in no way suggests that the time has come to eliminate the use of race-conscious remedial programs. As the Potomac Institute Report concluded, "the achievements of equal employment opportunity have not yet neared the levels that would justify the dismantling of the governmental

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73/ Id. at 5.

74/ Id.

machinery that made them possible."[75/] In every category of the study, including income, unemployment rates and educational levels, members of minority groups did not fare as well as whites. This is of grave concern to Congress, which, as representative of all the people, is charged with ensuring the general welfare.

We as members of Congress consider race discrimination to be one of the most serious social issues of our time. Race-conscious legislation has made a difference in alleviating the consequences of discrimination. Nevertheless, we cannot in good conscience conclude that Congress' task has been completed. We urge the Court to decide this case in a way that preserves both the statutory framework now in place and

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75/ Id.

Congress' constitutional authority to resort to race-conscious remedial legislation in the future.

CONCLUSION

For the reasons discussed in Section One of this brief, the Court should uphold the constitutionality of Article XII and affirm the decision of the Sixth Circuit. However, if the Court reverses the decision below, we as legislators urge the Court to frame its opinion and instructions to the court below in a manner that does not impair

Congress' power to legislate race-conscious remedies pursuant to section five of the fourteenth amendment.

Respectfully submitted,

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No. 84-1340

IN THE

Supreme Court of the United States

October Term, 1985

Wendy Wygant, et al.,
Petitioners,

v.

Jackson Board of Education, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

This brief amicus curiae in support of Respondents is submitted with the written consents of counsel to all parties. Letters of consent are on file with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for

the fiscal management, staffing, continuity, and educational productivity of the public schools within their jurisdictions. NSBA submits this brief in the belief that the most effective manner of assuring an equal educational opportunity for all school children is through voluntary compliance by school boards and administrators with constitutional and statutory civil rights mandates.

If this Court requires school boards to wait for a court to order compliance with civil rights laws, rather than allowing boards to take the initiative on their own, such a decision could threaten the ability of the nation's public school boards to ensure that school systems are operated in a nondiscriminatory manner and in a climate of cooperation, not coercion.

ISSUE PRESENTED FOR REVIEW

Petitioners frame the issue presented for review as follows:

> Does the Constitution permit a public employer to adopt racial preferences for school teacher layoffs in the absence of judicial or administrative findings of past discrimination in employment or education based solely upon differences between the respective percentages of minority teachers and students?

Amicus respectfully submits that the issue is misstated. The lower court explicitly refused to rule on the question of whether the District Court was correct in utilizing the minority student ratio to determine underrepresentation of teachers, stating "no such issue was presented." 746 F.2d 1152, 1156 footnote 1. The issue decided below, and the issue which Amicus will address in its brief is:

> Whether the Constitution permits a public employer to enter into a collective bargaining agreement which,

> in the event the district finds it necessary to lay off teachers, requires the district to maintain the same majority-minority ratio as existed at the time of the layoffs.

Amicus submits that the issue of the constitutionality of a standard used for hiring of teachers, which compares the student minority-majority ratio with the teacher ratio, is a separate issue from the one which is presented to the Court in this case. The Petitioners did not plead nor did the lower court decide the issue of discrimination in hiring. The sole issue for resolution here is whether the layoff provision in the contract is constitutional.

ARGUMENT

I. INTRODUCTION

Amicus agrees fully with the constitutional arguments made by Respondents and incorporates by reference the arguments set forth in the brief filed

herein by Respondents. Because the constitutional issues are fully briefed by Respondents, Amicus will address the broader policy questions presented by this case.

Petitioners argue for a rule that would prohibit school boards, in absence of a court order, from taking race into account at all in making decisions regarding employees. Such a rule would go beyond the requirements of the Constitution and, equally important, would be poor educational and public policy. As stated by Chief Justice Burger in the landmark case of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school

> should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court."

In absence of clear constitutional proscription to the contrary, school boards should continue to have the authority to use whatever methods they deem appropriate to maximize the benefits of the educational system for the students in the district.

II. THERE IS NO CONSTITUTIONAL DUTY TO GRANT A PREFERENCE TO EMPLOYEES ON THE BASIS OF SENIORITY.

The brief filed herein by Petitioners, as well as the briefs of amici who support the Petitioners' position, imply that the concept of seniority is sacrosanct and endows the senior employee with some kind of special constitutional right. That, of

course, is not the case.

Seniority is not a concept etched in constitutional stone, so heavy that it outweighs other considerations that may validly enter layoff determinations. Certainly, the Court has recognized that public employment contracts may create a property interest meriting due process protections. See, e.g., Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985). However, the Constitution in no way awards incremental degrees of protection based solely on the number of years an employee has held a particular position. Although reducing the faculty in order of seniority may be more objective than other layoff criteria, the relative objectivity should not be confused with issues of constitutionality.

Preserving seniority rights of public

employees during a reduction in force can be supported on several grounds. However, such a goal should not be allowed to rise to the level of a constitutional barrier preventing a public employer from voluntarily entering into a collective bargaining agreement that recognizes the need to accord special treatment to minority personnel so that past racial imbalances in staff composition do not once again become present reality.

State statutes in large part acknowledge that school boards should retain discretion in making layoff determinations and do not create entitlement to seniority rights.

Amicus has attached at Appendix A a state-by-state analysis of statutory provisions relating to reductions in force. Forty-one states have statutory

provisions which authorize school districts to employ reductions in force for a variety of specified reasons, such as decreased enrollment, reorganization, fiscal limitations or the elimination of a program or position. Of the statutes which authorize reductions in force, nineteen do not statutorily impose the order of dismissal or suspension when a reduction of personnel becomes necessary. The absence of restrictions in this regard clearly suggests that these state legislatures have left layoff decisions to the discretion of the local school boards.

The twenty-two states that do specify a particular layoff scheme that school boards must follow in reducing their faculties vary in the degree of statutory control they exert. Only seven states provide that teachers must be laid off in

reverse order of seniority, without indicating any possibility of variance. (Two of these states include in their layoff scheme a provision calling for nontenured teachers to be dismissed first). Three other states require school districts to follow a nontenured first rule in laying off teachers, without other restriction.

It should be noted that the imposition of a nontenured first rule does not restrict the school district's discretion in determining which nontenured teachers should be dismissed in the event of a reduction in staff levels and, once all nontenured teachers are dismissed, there is no restriction as to which tenured teachers should be dismissed first. In fact one state, Connecticut, provides that tenured personnel be dismissed according

to the terms of the collective bargaining agreement negotiated between the district and the teachers' union.

All of the remaining twelve states of the twenty two specifying a particular layoff system, allow the local school district to modify or deviate from the statutorily mandated layoff plan under certain circumstances or otherwise allow the districts to control the layoff policy.

Six states provide inverse seniority as the general order in which layoffs should be made (one includes a nontenured first rule as well) but specifically list instances where school districts may diverge from this pattern in order to satisfy special curriculum needs, equal protection considerations, collective bargaining terms or affirmative action

contract purposes.

Two states, Florida and Maine, explicitly require that layoff of teachers be controlled by the terms of a collective bargaining agreement. Maine's statute also contains a proscription against the use of seniority as the sole criterion for layoff. Oregon provides that layoff decisions be made on the basis of affirmative action needs, seniority and merit. The interests of the school system control the order in which teachers in Louisiance may be dismissed for reduction in force purposes. Finally, one legislature simply requires each school board to establish a written layoff policy.

Clearly, the states overwhelmingly prefer giving local school districts either total or partial control over

layoff determinations rather than restricting the order of suspension or dismissal to inverse seniority. As noted above, only seven of the fifty states and District of Columbia bind school districts to inverse seniority layoff schemes without permitting any variance. Even adding the other three states which require strict adherence to a nontenured first rule to this figure does not change the conclusion that the vast majority of state legislatures have not made seniority in public employment into a statutory bulwark impervious to the real need for discretion on the part of school boards to include race as a factor in making layoff decisions.

NSBA conducted a survey, for the purpose of the submission of this brief, of the membership of its Council of Urban

Boards of Education to elicit views as to the effect which reversal of the lower court decision would have on affirmative action efforts in the largest school districts in the country and to determine what criteria the boards use in making decisions on layoffs.

The Council of Urban Boards of Education was established by NSBA in 1967 to address the unique needs of school board members serving the largest cities of the United States. Its membership is composed of school boards in communities with a core-city population of least 100,000 persons.

Approximately 60% of the membership of the Council of Urban Boards responded to the NSBA survey. The names and enrollment of the districts which responded are listed in Appendix B. Those survey

respondents are responsible for the education of 5,188,025 children, which constitutes over 13% of the total student enrollment in elementary and secondary schools in the nation and over 50% of the minority student enrollment. Thus, the impact of the policies and practices of these districts on the education of the nation's children is significant.

Over two-thirds of the respondents to the survey have adopted voluntary affirmative action plans. Forty-one of the districts are parties to collective bargaining agreements, out of which 18 have affirmative action provisions. Thirty-seven districts have provisions relating to reductions in force in their affirmative action plan, their collective bargaining contract or a board policy. Twelve of the districts have provisions in

their plans or contracts which treat minorities differently for layoff purposes. Fourteen other districts treat minorities differently for the purpose of promotion or transfer. Four districts treat other groups of employees differently for the purpose of layoff, two exempt mathematics and science teachers from layoff and one exempts the head coach as well as requiring that the minority-majority ratio be maintained.

With reference to the head coach exemption, one wonders about the state of the law if a school board may take affirmative action to assure that the head coach is not laid off but may not take action to assure that an inordinate number of minority faculty members are not laid off.

III. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE ALL RACES TO BE TREATED THE SAME.

Although a court might not have the authority to require the school board to assure that the proportion of minority to majority teachers is maintained, the school board does and should have the authority to voluntarily agree with its teachers' union to maintain that proportion.

The concept of equality does not necessarily mean treating people the same. It is naive to believe that equality can be promoted without taking account of race. All things being equal, a "color blind" system may be the best system. But all things are not equal in a school system where treating all employees the same in a layoff situation would result in the dismissal of all or most of the

minority employees, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971).

Unfortunately this country is still suffering the results of massive discrimination against minorities and it will take more than court orders to remove those effects. Public and private employers alike must take voluntary affirmative efforts to eradicate discrimination from society, "root and branch." Green v. County School Board, 391 U.S. 430 (1968). There is no way that those efforts will be effective if employers are required to be "color blind."

This Court has noted that teachers should be assigned to schools in a manner that avoids creating the perception that a school is for whites only or for blacks

only. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971). Similarly, in the instant case what perception would have been created if the Petitioners' idea of "equality" had been put into place and teachers were dismissed on the basis of seniority? It does not require a study to reach the conclusion that dismissing most of the black teachers in the district would have a negative impact on black students.

Amicus endorses the discussion in Respondent's brief relating to the question of whether all distinctions based on race are "suspect" under the Equal Protection Clause. It may be true, as noted in the brief of Petitioners, that any distinction based on race might cause a certain amount of strife. However, that is not a reason to elevate all such

classifications to a level above other types of distinctions. One wonders if an art teacher would not be as upset over being laid off in favor of a head coach with less seniority than would a white teacher in the same situation with a black teacher. Layoffs cause controversy in whatever form they are made.

IV. SCHOOL BOARDS MAY CONSTITUTIONALLY MAKE RACE-CONSCIOUS EMPLOYMENT DECISIONS TO IMPLEMENT A POLICY THAT A RACIAL MIX IN THE DISTRICT'S FACULTY IS BENEFICIAL TO THE EDUCATION OF THE STUDENT BODY.

Petitioners disagree with the Jackson Board of Education's rationale in attempting to assure that the minority-majority ratio of teachers is not altered by the layoffs. Petitioners argue that there is no evidence to show that having black "role models" is necessarily beneficial to a black student's ability to

learn.

Psychological studies have shown that race and ethnicity are important factors in both the student-teacher relationship and the learning process. For example, research has shown that black and white teachers have markedly different academic expectations for their students, clearly favoring students of their own race when questioned as to which will achieve certain educational goals. Hendersen, E. and Long, B. Academic Expectancies of Black and White Teachers for Black and White First Graders. Proceedings of the 77th Annual Convention of the American Psychological Asssociation, Montreal, Canada 1973 Vol. 8, 687-688.

Studies have also shown that teachers direct different amounts and forms of praise and criticism towards students of

different races. . Simpson, A. and Erickson, M. Teachers' Verbal and Nonverbal Communication Patterns as a Function of Teacher Race, Student Gender and Student Race. American Educational Research Journal, 1983 (Sum.), vol. 20(2), 183-198.

The majority of the respondents to NSBA's survey of its Council of Urban Boards of Education stated their belief that affirmative action in employment is an important tool in the education of all children, both black and white, and school boards should have as wide discretion as possible in developing voluntary plans. Some opined that it is particularly important to allow such provisions in collective bargaining agreements.

Following are some examples of policy statements on the subject of role models

and affirmative action which are contained in affirmative action plans submitted as a part of the NSBA survey:

- [I]t has been recognized by most educators within our pluralistic society, that school districts have an obligation to promote cultural, racial, and human understanding within the communities they serve. An effective method for this district of achieving this objective is to provide students with a district staff that is reflective of both sexes, as well as multi-ethnic and cultural characteristics of society.

- To provide in-depth education, the schools need to provide in the learning environment an opportunity for children to experience highly qualified representatives of all ethnic groups and cultures as part of their education since they need to learn to function in a pluralistic world.

- America is a land of diversity whose quality of character springs from the creativity, the toil, the intelligence and the struggles of individuals of all races and cultures. It is important, therefore, that all students

understand and appreciate that their world is built by the hands and minds of people who are from many national, religious, ethnic and cultural backgrounds. This understanding and appreciation is enhanced when students see members of their own ethnic groups in roles of inspirational leadership.

- [S]ome of our children are handicapped by being separated residentially and socially from the majority of the community's population by reason of their ethnic and economic background.

  [T]his separation...is rooted in causes which are far beyond the power of the schools alone to correct or eliminate; the cooperative efforts of all segments of the population and its agencies, public and private, are required.

  [T]he public schools, however, have the responsiblility to make every possible effort consistent with their educational responsibilities to minimize the effect of this separation among pupils. In this we are cognizant both of the handicap imposed on the child subjected to separation, and the fact that pupil groupings representative of a broad cross-section of all elements in the community is a desirable educational environment for all pupils involved.

> • The minority student attending a school with a relatively high percentage of minority students [should have] available to him the positive image provided by a minority teacher, counselor and administrator.
>
> Minority students should be provided with employees of their own race whom they can recognize as examples of occupational achievement. The child from the majority group should have positive experiences with minority people which can be provided, in part, by having minority teachers, counselors and administrators where the enrollment is largely made up of majority group students. Majority students should be given an opportunity to be instructed by, and relate to, members of minority races in order to alleviate racial isolation.

There is a continuing argument among educators as to what makes children learn. And, education being more an art than a science, the debate will continue. However, whatever merit there is in either side of the argument as to whether

children learn better with a racially mixed faculty, that argument should not be fought in the courts.

As this Court has cautioned on several occasions, "courts lack the 'specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy'." Board of Education et al. v. Rowley, 102 S.Ct. 3034 (1982).

The issue here is not whether the school board was correct in its educational judgment that the students will be better served with a mixture of races on the faculty. That is not an issue which courts should attempt to resolve. The issue for the courts is whether, in order to meet its policy objectives, a board may constitutionally exempt minority faculty members from an

otherwise racially neutral scheme of layoffs in order to maintain a racial mixture.

If hiring decisions are made in a constitutional manner in the first instance, the school board may constitutionally elect to maintain the racial mix which resulted from the nondiscriminatory hiring.

Petitioners complain of what they call racial "preferences." As noted above, the Petitioners also misstate the issue in this case as being related to the hiring decisions made by Respondents. But the policy of maintaining the racial mix of the district in the event of the need to lay off teachers, is conceptually, and possibly constitutionally, different from a so-called "preference" of one race over another in hiring. Where an employer has,

through constitutionally valid affirmative action efforts, realized a goal of a particular minority-majority ratio, it would seem permissible for the employer to take steps to protect that ratio, even by the means of exempting minorities from layoff to the extent required to retain the existing racial proportion.

Amicus urges this Court not to overturn Jackson's layoff plan merely because of allegations in briefs that the hiring methodology was allegedly constitutionally infirm. It should be noted that first, there is no evidence that the hiring process was faulty, the lower court having expressly stated that it was not reaching that issue; and second, that the board used the student body ratio only as a "goal." There is no evidence that the Jackson Board hired

minority personnel in order to meet a quota or that it refused jobs to whites solely because of their race. Race is a proper criterion for employment, if not used as the sole consideration and the use of goals in affirmative action plans has been expressly upheld by the courts.

Contractors Ass'n of Eastern Pa. v. U.S. Department of Labor, involved the question of whether the President had the authority to require federal contractors to establish goals and timetables to increase minorities in their workforces. The union plaintiffs argued that such a requirement was discriminatory and that the government did not have the authority to make such requirements in absence of a court finding of discrimination. The court held:

> "Even absent a finding tht the situation found to exist in the

> five-county area [low percentage of minorities] was the result of deliberate past discrimination, the federal interest in improving the availability of key tradesmen in the labor pool would be the same. While a court must find intentional past discrimination before it can require affirmative action under 42 U.S.C. section 2000e5(g), that section imposes no restraint upon the measures which the President may require of the beneficiaries of federal assistance." 442 F.2d 159, 175 (3rd Cir. 1971).

> "[T]he plaintiffs urge that the specific goals specified by the Plan [which requires the setting of goals and timetables for hiring of minorities] are racial quotas prohibited by the equal protection aspect of the Fifth Amendment...The Philadelphia Plan is valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. The Fifth Amendment does not prohibit such action. .A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual

remedial action." at page 177.

But even assuming arguendo that, in absence of a court order, a school board cannot refuse to hire members of one race in order to reach a desired minority-majority ratio, it does not follow that an employer cannot constitutionally exempt from layoff members of one race in order to maintain a ratio which was achieved in a constitutional manner.

The entire argument of Petitioners is based on an assumption that there is only one reason for which a public employer may constitutionally exempt minorities from layoff. That reason, under Petitioners rationale, is when there has been a finding by a court that the particular employee exempted from layoff would have had seniority had the employer not

subjected the employee to discrimination on the basis of his or her race.

In order to accept that argument several assumptions must be made: first, that senior employees have a constitutional right to be laid off last and second, that an employer may not take race into account in setting criteria for the order of layoffs. Both assumptions are faulty.

Although it is true that a court may not order an employer to take race into account in the absence of a finding of discrimination, that is not the case with purely voluntary actions by the employer. Public school systems in particular should be allowed the latitude in making decisions as to who to lay off and who to retain, because they are charged with the heavy responsibility of assuring the

education of all children in the district and taking steps to make the process easier. In this case, the board has determined that to lay off teachers on a race neutral basis would result in the loss of minority teachers, to the detriment of the children. That would seem to be an appropriate decision for the board.

V. SCHOOL BOARDS SHOULD BE ALLOWED TO PROTECT THEMSELVES FROM DAMAGE SUITS UNDER SECTION 1983 BY TAKING CORRECTIVE ACTION WITHOUT A COURT ORDER.

This Court has on numerous occasions held that school boards have an affirmative duty to eliminate all effects of past discrimination and to assure the development of a unitary school system. See, e.g., Milliken v. Bradley, 433 U.S. 267 (1977); Green v. County School Boards, 391 U.S. 430 (1968); Louisiana v. United

States, 380 U.S. 433 (1965).

It is entirely conceivable that a court might agree with the board of education that at least one reason for the disproportionately low number of minority faculty members, before the board began affirmative efforts to increase that proportion, was because of past discriminatory action by a previous board of education. If this board has done nothing to rectify that discrimination, a court could order remedial efforts to begin immediately and, further, could hold the board liable in damages, under 42 U.S.C. 1983, and also award attorneys' fees under 42 U.S.C. 1988.

Yet, Petitioners argue that the board is unauthorized to make that determination itself and to take action on its own to assure that the positive gains in numbers

of minority faculty are not lost during the process of implementing a plan to reduce the labor force. Petitioners would have the board use a "color blind" scheme which would assuredly result in the loss of the majority of the black employees. Then the board would be called upon to sit back and wait for a court to hold its action discriminatory and order a damage award against the board. Surely the board should have the authority to make its own determination as to whether discrimination existed and, if so, the manner in which it should be addressed.

VI. CONCLUSION

On behalf of school boards across the country which are attempting to remove the effects of discrimination by their respective school districts, as well as by society at large, Amicus urges this Court not to tie their hands. School boards

should be allowed to use all available tools to assure each student in the school district an equal educational opportunity. Not all school boards are willing to adopt voluntary affirmative action plans, it being politically expedient, in many cases, to do nothing. But--where school boards take on the task voluntarily, the public and the courts owe a moral and constitutional duty to those boards to support their efforts.

Respectfully submitted,

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NSBA Executive Director

APPENDIX A

STATE STATUTORY PROVISIONS
SPECIFYING LAYOFF ORDER

State	Order of Layoff	*RIF Statute Citation
Alabama	None specified.	Code of Al. §16-24-8 (1977)
Alaska	None specified.	Ak. Stat. §14.20.175 (1984)
Arizona	None specified.	Az. Rev. Stat.Ann. §15-544 (1984)
Arkansas		None
California	Inverse seniority but deviations allowed to meet special needs or equal protection requirements	Ann.Calif. Educ.Code §44955(b), (d)(Supp. 1985)
Colorado	Nontenured first.	Co.Rev. Stat.§22-63-112(3) (1984)

* "Reduction in force"

State	Order of Layoff	RIF Statute Citation
Connecticut	Nontenured first. For tenured personnel, follow collective bargaining agreement or board policy.	Ct.Gen. Stat.Ann. §10-151(d) (Supp.1985)
Delaware	None specified.	Del.Code Ann.Tit.14 §1411(1981)
District of Columbia		None
Florida	Pursuant to terms of collective bargaining agreement; if none, board must prescribe RIF rules.	Fla.Stat. Ann.§231.36 (5)(Supp.) 1985)
Georgia	None specified.	Code of Ga. Ann.§20-2-940(a)(6) (1982)
Idaho	None specified.	Ida.Code §33-515 (Supp.1985)
Illinois	Nontenured first and inverse seniority but can deviate by collective bargaining or for affirmative action purposes.	Ill.Rev. Stat.122 §24-12 (1985)

State	Order of Layoff	RIF Statute Citation
Indiana	None specified.	Ind.Stat. §20-6.1-4-10(a)(5) (Supp.1984)
Iowa		None
Kansas		None
Kentucky	Inverse seniority.	Ky.Rev. Stat. §161.800 (1984)
Louisiana	Interests of the school system.	La.Opp. Atty. Gen. 1938-40 p. 1004.
Maine	Pursuant to negotiated agreement; may include but cannot be limited to seniority.	Me.Rev. Stat.Ann. Tit.20A §13201 (1984)
Maryland		None
Massachusetts	Nontenured first.	Mass.Gen.Laws Ann.71 §42 (1982)
Michigan	None specified.	Mich.Comp. Laws §38.105 (1982)

State	Order of Layoff	RIF Statute Citation
Minnesota	Inverse seniority but can deviate for affirmative action purposes.	Minn.Stat. §125.12 Subd.6b(d) (1984)
Mississippi		None
Missouri	Nontenured first and inverse seniority.	Rev.Stat.Mo. §168.291 (1984)
Montana	None specified.	Mt.Code Ann. §20-4-206(4) (1983)
Nebraska	Each board must adopt RIF policy which follows nontenured first unless would cause noncompliance with federal or state affirmative action requirements.	Neb.Stat. §§79-1264.05, 79-1254.08 (1984)
Nevada	None specified.	Nev.Rev.Stat. §391,312(g) (1983)
New Hampshire		None
New Jersey	Inverse seniority.	NJ Stat.Ann. §18A:28-9 et seq.(1968)

State	Order of Layoff	RIF Statute Citation
New Mexico		None
New York	Inverse seniority.	Consol.Laws NY 16 Educ. Code §2855 (1981 & Supp. 1985)
North Carolina	None specified.	NC Gen.Stat. §115C 325(e) §(10(1983)
North Dakota	None specified.	ND Cent.Code §15-53.1-26.1 (2)(1982)
Ohio	Nontenured first & inverse seniority	Oh.Rev.Code §3319.17 (1980)
Oklahoma		None
Oregon	Pursuant to affirmative action policy of district but also seniority and merit.	Or.Rev.Stat. §342.943(3) (1983)
Pennsylvania	Inverse seniority but not to supersede or preempt collective bargaining agreement; however, teacher not a bargaining unit member retains seniority.	24 Pa.Stat. §11-1125.1 (Supp. 1985)

State	Order of Layoff	RIF Statute Citation
Rhode Island	Inverse seniority but can deviate where necessary to retain teachers of technical subjects whose places more senior teachers cannot fill.	Gen.Laws R.I. §16-13-6 (1981)
South Carolina		None
South Dakota	All boards must establish written staff reduction policies.	SD Cod.Laws §13-10-11 (1982)
Tennessee	None specified.	Tenn.Code Ann. §49-5-511(b)(1) (1983)
Texas	Inverse seniority.	Tex.Code Ann. §13.110 (Supp.1985)
Utah	None specified.	Ut.Code Ann. §53.51-8 (1982)
Vermont	None specified.	Vt.Stat.Ann. Tit.16 563 (12)(1976)
Virginia	None specified.	Code of Va. §22.1-304 (1980)

State	Order of Layoff	RIF Statute Citation
Washington	None specified.	Rev.Code Wa. §28A 67.070 (1984)
West Virginia	None specified	W.Va.Code §18A-2-2 (Supp.1985)
Wisconsin	Inverse seniority but can deviate by collective bargaining agreement.	Wi.Stat. §118.23(4), (5) (1984)
Wyoming	None specified.	Wyo.Stat.Ann. §21-7-111(a)(iv)(1977)

SUMMARY

Statutory Analysis	Number of States
Total surveyed.....	51
With RIF statute.....	41
No layoff order specified.....	19
Layoff scheme specified.....	22
• Nontenured first- no deviations allowed	3
• Nontenured first- deviations allowed....	1
• Inverse seniority- no deviations.....	5
• Inverse seniority- deviations allowed....	5
• Nontenured first & inverse seniority- no deviations.....	2
• nontenured first & inverse seniority- deviations allowed....	1
• Take account of affirmative action, seniority and merit.....	2
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• According to collective bargaining agreement..	2
• School board must establish layoff policy	1

APPENDIX B

COUNCIL OF URBAN BOARDS
OF EDUCATION

Respondents to Survey

School District	Enrollment
ALASKA	
Anchorage	40,560
CALIFORNIA	
Anaheim	11,610
Los Angeles	672,183
Oakland	49,348
San Diego	110,655
COLORADO	
Aurora	23,787
Pueblo	18,475
DISTRICT OF COLUMBIA	86,568
FLORIDA	
Dade County, Miami	223,854
Orlando	88,485
Tampa	108,871
GEORGIA	
Atlanta	67,317
ILLINOIS	
Chicago	420,000
INDIANA	
Indianapolis	54,070
South Bend	21,952

School District	Enrollment
IOWA	
Cedar Rapids	17,829
KANSAS	
Kansas City	23,013
Topeka	14,500
Wichita	44,512
KENTUCKY	
Louisville	92,000
LOUISIANA	
Baton Rouge	55,700
MARYLAND	
Baltimore	116,872
MASSACHUSETTS	
Boston	55,470
MICHIGAN	
Ann Arbor	14,376
Detroit	191,387
Flint	30,876
Grand Rapids	34,236
MINNESOTA	
St. Paul	32,000
MISSOURI	
Springfield	22,917
NEBRASKA	
Omaha	41,193
NEVADA	
Reno	31,500

School District	Enrollment
NEW JERSEY	
Newark	57,296
NEW MEXICO	
Albuquerque	75,336
NEW YORK	
New York City	925,000
NORTH CAROLINA	
Charlotte	71,946
Raleigh	54,506
OHIO	
Canton	13,693
Columbus	67,761
Toledo	43,327
OKLAHOMA	
Oklahoma City	38,632
Tulsa	46,178
OREGON	
Portland	50,800
Salem	22,500
PENNSYLVANIA	
Philadelphia	203,000
Pittsburgh	41,269
TEXAS	
Dallas	127,000
Fort Worth	63,143
Houston	183,873

School District	Enrollment
VIRGINIA	
Alexandria	10,000
Charlotte-Mecklenburg	71,946
Hampton	20,466
Norfolk	35,649
Portsmouth	18,500
Richmond	31,500
Virginia Beach	56,150
WASHINGTON	
Seattle	42,438

No. 84-1340

Supreme Court, U.S.
FILED
AUG 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, *et al.*,

Petitioners,

—v.—

JACKSON BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS SUBMITTED BY THE AFFIRMATIVE ACTION COORDINATING CENTER, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, THE CENTER FOR CONSTITUTIONAL RIGHTS, AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION, LEAGUE OF MARTIN, SISTERS OF SAINT DOMINIC, WOMEN'S COALITION, INC., AND WOMEN'S DIVISION, GENERAL BOARD OF GLOBAL MINISTRIES, UNITED METHODIST CHURCH

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BEST AVAILABLE COPY

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ON WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief Amici Curiae of the Affirmative Action Coordinating Center; The National Conference of Black Laywers; The National Lawyers Guild; The Center for Constitutional Rights and other organizations in support of Respondents.

Consent of Parties

Amici Curiae filed this brief with the consent of all parties in support of the position advanced by respondents.

Letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The nine organizations joining in this brief as amici curiae (see Appendix A) represent many sections of American society with diverse interests. They share a mutual concern that the Court use the decision in this case to advance the commitment to rid our nation of the devastation of racial discrimination and race hatred. They are aware of the difficulty of this task.

These groups share an understanding that the continued exclusion of Blacks and other minorities from meaningful poliical and economic participation in the nation's schools is a legacy of slavery and racial discrimination.

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TABLE OF CASES AND AUTHORITIES

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Civil Rights Cases, 109 U.S. 3 (1883).....2

Fullilove v. Klutznick, 448 U.S. 448 (1981).....17

Jones v. Alfred H. Mayer, 342 U.S. 409 (1968).....2,3,8

United Steelworkers v. Weber, 443 U.S. 193 (1979).....passim

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SUMMARY OF ARGUMENT

Amici argue that the provisions of the collective bargaining agreement at issue in this case were designed to help eliminate the vestiges of slavery and segregation in the Jackson School system in a manner which fully effectuates the mandates to the Thirteenth Amendment. Amici further argue that this Court must construe the Equal Protection Guarantees of the Fourteenth Amendment consistent with the Thirteenth Amendment mandate to eliminate the vestiges of slavery. Fundamental rules of constitutional and statutory construction require this Court to follow this approach.

The Petitioners and the United States, by arguing that the Fourteenth Amendment prohibits the kind of voluntary action taken by Jackson Education Association and the Jackson Board of

Education to integrate its faculty have urged upon this Court a construction of the Fourteenth Amendment Equal Protection Clause that would plead out of existence the mandate of the Thirteenth Amendment that requires the steady elimination of the vestiges of slavery. This construction denies the existence of the history of slavery and its legacy and is contrary to law.

ARGUMENT

I. IT IS CONSISTENT WITH THE MANDATES OF THE THIRTEENTH AMENDMENT THAT PARTIES BE ENCOURAGED TO TAKE STEPS TO ELIMINATE ALL VESTIGES OF SLAVERY.

Justice Stewart, writing for the majority in Jones v. Alfred Mayer Company, 392 U.S. 409 (1968) embraced the views of the first Justice Harlan in his dissent in the Civil Rights Cases of 1883, 109 U.S. 3 (1883) as to the rights

created and protected by the Thirteenth Amendment.

In that historic decision, Justice Stewart declared:

> Just as the Black Codes enacted after the Civil War to restrict the free exercise of those rights were substituted for the slave system, so the exclusion of Negroes from White committees becomes a substitute for the Black Codes, and when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin then it too is a relic of slavery." Jones v. Mayer, supra, at 441-443.

Judge Wisdom, who was joined by five other judges in the Fifth Circuit, in a concurring and dissenting Opinion in Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984) recognized that this Court's decision in Jones v. Mayer, supra, restored the Thirteenth Amendment "to its rightful place in the Constitutional scheme."

> The abolition of slavery mandated by the amendment is

not confined to the elimination of the "auction block," that is, the institution of legally enforceable servitude. It also extends to the badges and incidents of a slavery system that were imposed upon blacks as a race. The abolition of slavery was intended to leave in its wake universal civil freedom... The thirteenth Amendment's mandate of universal freedom necessitated protection of blacks as a class against racial discrimination with regard to their civil rights. The burdens on enjoyment of their new found rights thus should be classified as badges of slavery... Because the thirteenth amendment seeks to attain "universal civil freedom for blacks as a race," remedial action must address the needs of blacks as a race. Remedies limited to identifiable victims will not carry out the mandate of the amendment to eliminate the "badges and incidents" of slavery. Nor will a prohibition on present practices alone remove the vestiges of slavery; positive, prospective remedial action is required.

729 F.2d at 1577-1580

II. THE COURT MUST ADOPT AN ANALYSIS OF THE EQUAL PROTECTION GUARANTEES THAT IS CONSISTENT WITH THE THIRTEENTH AMENDMENT MANDATE TO ELIMINATE THE

BADGES, INCIDENTS AND VESTIGES OF SLAVERY.

The task before this Court is to articulate standards of review under the Equal Protection Clause of the 14th Amendment that do not contravene the ability of public and private parties voluntarily to take steps to remedy present conditions of racial discrimination that are linked to slavery.

The statutory analysis of Title VII of the Court in United States v. Weber, 443 U.S. 193 (1979) comes closest to that analysis. The Weber court held that it was permissible for Kaiser Aluminum and the United Steelworkers to voluntarily adopt a race conscious plan to "eliminate traditional patterns of racial segregation." The Court in Weber firmly rooted itself in history and in the underlying purpose of Title VII which

was to tend the plight of the Negro in our economy." The Weber majority rejected arguments similar to the Petitioners and the government's herein to state:

> Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignomious page in this country's history...cannot be interpreted an an absolute prohibition against all private race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long." 110 Cong Rec 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

443 U.S. 193, 204

It is not difficult to analogise the stated goals of Title VII to the mandates of the Thirteenth Amendment to eliminate the badges, incidents and vestiges of slavery as they apply to breaking down under or over-representation of groups in traditionally segregated job categories.

The Court in Weber limited its holding to the private sector, deciding to wait for a later date to address the question whether municipally negotiated affirmative action, i.e. "state action," should cause a different result. The later date has arrived in the present case.

It is beyond question that the Thirteenth Amendment applies to both the public and private sectors. If the

mandates of the Thirteenth Amendment become the constitutional context in which 14th Amendment Equal Protection Guarantees are analyzed, this Court must find racial discrimination like the one at issue here properly justified under the 14th Amendment by the need to eliminate the badges and incidents and vestiges of slavery. Jones v. Alfred A. Mayer Co., 392 U.S. 409 (1968). As Judge John Minor Wisdom pointed out in his pathbreaking opinion in Williams v. City of New Orleans, 729 F.2d 1554, 1579 (5th Cir. 1984), "current forms of racial discrimination are badges of slavery that may be proscribed under the thirteenth amendment if they are historically linked with slavery or involuntary servitude."

III. THE GROSS UNDER-REPRESENTATION AND SEGREGATION OF MINORITY FACULTY IS A VESTIGE OF SCHOOL SEGREGATION WHICH IS A CLEAR VESTIGE OF SLAVERY.

Prior to the Civil War most of the few schools available to Black Americans in the North were intentionally segregated under the "Jim Crow" (racist) laws first put into place in Northern states.[1] After the Civil War, liberal northerners involved in the Freedman's Bureau set up the first schools for black children in the south. Black pressure for educational opportunities contributed to the growth of schools over the last decades of the 19th century and the first decades of the 1900s.[2] As black schools became more widespread in the south, and

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[1]Lerone Bennett, Jr., Before the Mayflower (Baltimore: Pelican Books, 1966), pp. 220-225.

[2]Henry A. Bullock, A History of Negro Education in the South (New York: Praeger, 1967), 23-59, 151 ff.

as former slaveholding whites took back the reigns of power from those who held power during Reconstruction, black schools were rigidly and comprehensively segregated under southern law. That the intent of former white slaveholders was to perpetuate the same type of control and subordination of blacks as had been the case under slavery is well-documented in historical research.[3] A few black colleges were allowed, under strict white supervision, to prepare the thousands of black teachers required for the segregated schools of the 1890-1960 period of semi-slavery in the south.[4] The colleges never had the resources to

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[3]Ibid. pp. 152-193; Gunnar Mydal, An American Dilemma, vol. 2 (New York: McGraw Hill Paperback, 1962), pp. 893-952.

[4]Bullock, A History of Negro Education, pp. 31-32; Myrdal, An American Dilemma, vol. 2, pp. 632, 893-897.

provide the number of teachers necessary because of extreme discrimination in the distribution of tax monies.

It wasn't until the 1967-1971 period that significant school desegregation came to the south. Technically, the demise of legal segregation in schools began in the 1950s, but 1970 is perhaps a more accurate date to mark the end of legal (formal) segregation in the south. In addition, when desegregation was forced upon formerly segregated school districts, thousands of black teachers were dismissed, in part because the whites in control indulged in racial nepotism and did not want white children to be taught by black teachers. Between 1967 and 1971 alone more than 6,000 black teachers were displaced. Half were dismissed, while the rest were demoted, assigned out of their fields, or put in

unsatisfactory placements.[5] Butler's study of Louisiana teachers demonstrates that the black percentage of all teachers in Louisiana decreased over the 1966-1971 period of school desegregation. Many black teachers, usually without any careful evaluation, were dismissed for "incompetancy," which was the rationalization racist white administrators utilized.[6]

Widespread dismissals in the south had the effect of discouraging younger Black Americans from training to be teachers. In addition, there were far fewer role models in the form of black teachers -- once a major role model across the south -- for black young

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[5]John S. Butler, "Black Educators in Louisiana -- A Questicn of Survival," Journal of Negro Education (Winter 1974), pp. 9-24.

[6]Id.

people in cities and rural areas.[7] Since the Jackson School Board recruited black teachers from the south, and since they found there a smaller pool of teachers than would have been the case without slavery, and segregation, the vestiges of slavery can be seen in the under-representation of black teachers in Jackson.

According to the Carnegie Foundation report, The Condition of Teaching, black teachers are sharply under-represented nationally and in Michigan. In the fall of 1980, about 27 percent of U.S. children in school (K-12) were minority, while only 12.5 percent of the teachers were minority. In Michigan, 21.3 percent of the students were minority, compared

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[7]Id.

to just 11.6 percent of the teachers.[8] Most of the minority students and teachers are black. This significant under-representation in Michigan is not new and is rooted in the slavery and semi-slavery systems which handicapped, and continue to handicap, Black Americans. Resource deficits of black parents translate into fewer young black teachers in eligibility pools.

IV. IT WAS REASONABLE FOR THE PARTIES TO CONCLUDE THAT THE GOAL OF REACHING PARITY BETWEEN THE PERCENTAGE OF MINORITY TEACHERS AND MINORITY STUDENTS WOULD GO A LONG WAY TOWARD ELIMINATING EFFECTS OF RACIAL SEGREGATION IN THE SCHOOL SYSTEM; THUS, THE NEGOTIATED SENIORITY SYSTEM WHICH RETAINS MINORITY PERCENTAGES BEFORE AND AFTER LAY OFF IS TOTALLY BONA FIDE.

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[8] C. Emily Feistritzer, The Condition of Teaching: A State by State Analysis (Princeton, N.J.: Carnegie Foundation for the Advancement of Teaching, 1983), pp. 27, 43.

Respondents have stated the facts and history behind the negotiation of the contract in question in respondent's brief. Amici do not repeat that here except to state our agreement that it was perfectly reasonable for the parties to conclude that achieving parity between the percentage of minority teachers and minority students would go a long way toward eliminating the effects of racial segregation. The lay off provision contained in Article XII which helps achieve that end is therefore totally bona fide. Because the previous condition of school and faculty segregation under-representation of minority faculty in the Jackson schools is easily linked to slavery the voluntary act of the school board and the union to dismantle that segregated system is totally consistent with the mandates of the Thirteenth Amendment.

If, as Amici argue, the actions of the Jackson School Board are totally consistent with the mandates of the Thirteenth Amendment, fundamental principles of constitutional construction require that this court adopt a Fourteenth Amendment Equal Protection analysis that will give effect to both provisions. It is for this reason that Amici assert that an action which is consistent with the mandates of the Thirteenth Amendment cannot violate the Equal Protection Clause of the Fourteenth Amendment.

Because of the history of slavery, black Americans have consistently faced high levels of racial discrimination in housing, jobs and education from the the 1880s to the present. In that slavery was fundamentally based on an ideology of white supremacy, non-white minorities

such as Hispanics suffer from some of the same disabilities as Blacks.

Any race-conscious remedy which is designed to end an over-representation of whites in a traditionally segregated job category will fall on whites who did not directly participate in the conditions sought to be remedied. This is unfortunate, but also a reality. Care, however, may be taken to ensure that the interests of whites not be unnecessarily trammeled.

This Court has consistently upheld the use of race conscious remedies (Bakke, Weber, Fullilove).

Amici urge this Court to give broad discretion to parties to collective bargaining agreements and courts dealing with consent decrees to fashion race conscious remedies which effectuate the purposes of the thirteenth and fourteenth amendments. The Jackson Board of

Education acted reasonably in negotiating its collective bargaining agreement. The agreement is totally consistent with the policy of non-discrimination which has found support in hundreds of this Court's opinions. The contract language should therefore be upheld.

V. CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

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APPENDIX A

AMICI STATEMENTS OF INTEREST

The AFFIRMATIVE ACTION COORDINATING CENTER (AACC) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR), and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other other organizations. Many network organizations, as well as other groups, have joined as amici in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civl rights, labor, and

women's rights attorneys to discuss the WEBER, BAKKE, FULLILOVE, AND WHITE cases.

The AACC publishes an informational newsletter entitled AACC News. It is preparing several plain language publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION is a national, professional association for equal opportunity-affirmative action administrators and specialists, individuals, and organizations sharing similiar interests and concerns. It was founded in 1974 to foster the implementation of affirmative action and equal opportunity nationwide and to provide liason with other organizations committed to the same purposes or objectives. The Association urges affirmance of the decision of the Sixth Circuit Court of Appeals in this case.

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing, and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans, and Chicanos.

The LEAGUE OF MARTIN is a non-profit organization incorporated in 1974. Members of the League of Martin have been Milwaukee police officers and the organization's primary concern is racial discrimination within the Milwaukee Police Department. The League of Martin has undertaken numerous activities to eliminate discriminatory employment practices of the City of Milwaukee Police Department including filing of charges of discrimination with the United States Equal Employment Opportunity Commission and litigation.

The NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) is an activist legal organization of Black lawyers, law professors, judges, and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has led the struggle for the full implementation of the principles of affirmative action that have been affirmed by the Congress and the courts.

The NATIONAL LAWYERS GUILD (NLG) was founded in 1937 as a multi-racial and progressive alternative to the American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild has filed briefs in every major affirmative action case to reach this Court.

The SISTERS OF SAINT DOMINIC, based in Racine, Wisconsin, is a national congregation of Catholic women religious of approximately 360. In 1977, the Sisters of St. Domic stated that they would identify with the poor, oppressed, and alienated and would work in an advocacy role, helping them to secure what is rightfully theirs. The community holds that integration of the public work force is a value to be achieved and supercedes strict seniority in hiring and layoff procedures.

The WOMEN'S COALITION, INC. is an umbrella organization of thirteen women's organizations in Milwaukee, Wisconsin. The Coalition was established in 1972 to meet the needs of Milwaukee area women through organizing, establishing services, providing a meeting place for women, and creating a centralized information and referral service. Among its activities has been sponsoring annual "Take Back the Night" demonstrations and activities related to the problem of sexual assault and violence against women, and thousands of person have participated in these actions locally.

The WOMEN'S DIVISION, GENERAL BOARD OF GLOBAL MINISTRIES, UNITED METHODIST CHURCH, is the policy making body for over 1,000,000 United Methodist Women throughout the United States. The division has a long history of actions and concerns about economic justice and collective bargaining. For over 100 years it has undertaken mission work on behalf of the poor and oppressed. The division urges affirmance of the decision of the sixth circuit court of appeals in this case.

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No. 84-1340

IN THE

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October Term, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,
Petitioners,

vs.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President; and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE STATES OF MINNESOTA, CALIFORNIA, LOUISIANA, NEBRASKA, NEW MEXICO AND WISCONSIN AND THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Amici States, through their Attorneys General, respectfully offer this brief in support of respondents. Amici are public employers who seek to retain newly hired, qualified minority employees deemed underrepresented in the state work force. The retention of such employees fosters respect for and enhances the effectiveness of state activities which seek to eliminate racial discrimination and promote equal rights.

Amici are subject to adverse economic conditions that have required or may in the future require employee layoffs. Because newly hired minority employees are among the least senior employees, traditional seniority systems requiring the last hired to be the first fired result in disproportionate layoffs of minorities. Amici have negotiated or may in the future consider negotiating collective bargaining agreements with public employees containing provisions designed to preserve prior affirmative action gains in state employment.[1] In addition, Amici have enacted or may in the future consider enacting legislation authorizing non-seniority layoffs of public employees for the same purposes.[2]

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[1] *See* Appendix A for the relevant provisions of the collective bargaining agreement between the Minnesota Association of Professional Employees and the State of Minnesota for the period July 1, 1983-June 30, 1985, and the agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, October 30, 1983-June 30, 1985.

[2] *See* Appendix B for relevant provisions of California and Wisconsin statutes and the Wisconsin Administrative Code.

SUMMARY OF ARGUMENT

The Court should allow public employers to make race-conscious layoffs, especially when mutually agreed upon in a collective bargaining agreement, for the purpose of retaining qualified minority employees deemed underrepresented in the state work force. Such layoffs are consistent with the equal protection clause because they further the state's compelling interest in remedying the effects of past discrimination in its own work force and encouraging private employers to reach the same goal. Race-conscious layoffs are narrowly tailored to those purposes because they are temporary and reasonable.

The congressional determination in Title VII[3] that past discrimination in employment has resulted in racial imbalance, together with a public employer's determination of minority underrepresentation in a particular work force, establishes the remedial purpose of such layoffs.

Title VII permits private employers to make such layoffs, and the requisites for engaging in affirmative action under Title VII, outlined in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), are functionally equivalent to factors considered in a strict scrutiny analysis under the equal protection clause. There is thus no basis for imposing greater restrictions on race-conscious remedial actions by public employers than on private employers.

Because of the above reasons the judgment below should be affirmed.

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[3] Civil Rights Act of 1964, 78 Stat. 253, as amended 42 U.S.C. §§ 2000e *et seq.*

ARGUMENT

I. A PUBLIC EMPLOYER'S LAYOFF PLAN WHICH RETAINS UNDERREPRESENTED MINORITIES FURTHERS THE COMPELLING STATE INTERESTS OF ELIMINATING THE EFFECTS OF PAST DISCRIMINATION IN PUBLIC EMPLOYMENT AND PROVIDING A MODEL FOR THE COMMUNITY.

The states have a compelling interest in eliminating the effects of past discrimination. *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978). In enacting Title VII, Congress found that minority underrepresentation in employment is often the continuing effect of past discrimination. Given this congressional finding, a state's determination that minorities are underrepresented in its work force establishes a compelling state interest in eliminating race discrimination through race-conscious layoffs. In addition, the state's efforts to eliminate the vestiges of discrimination in its own work force serves the compelling interest of providing leadership to private employers and others in eliminating such vestiges.[4]

[4] This brief analyzes race-conscious layoffs under the strict scrutiny standard of review. If a racial classification satisfies the strict scrutiny standard of review, it certainly also satisfies the intermediate standard of review proposed by Justice Brennan in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The intermediate level of review requires that racial classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives." 438 U.S. at 359.

A. Minority Underrepresentation in The Public Employer's Work Force is Likely to be The Result of Past Discrimination.

Title VII was the congressional answer to pervasive racial discrimination in employment. At the time Title VII was enacted, blacks were largely relegated to unskilled and semi-skilled jobs and the relative position of black workers was steadily worsening. 110 Cong. Rec. 6547-6548 (1964) (statement of Sen. Humphrey). The goal of the statute was to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Id.* at 6548. To that end, Congress enacted a measure which would break down the barriers to black employment even absent proof that those barriers had the purpose of excluding blacks. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

In 1972, Congress amended Title VII to bring public employees under the purview of the statute.[5] Congress relied on findings of the United States Commission on Civil Rights, which reported that "widespread discrimination against minorities exists in State and local government employment," and that "employment discrimination in State and local governments is more pervasive than in the private sector." H.R. Rep. No. 238, 92 Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News, 2137, 2152. Congress noted commission studies which showed that in most geographic areas examined, blacks constituted more than 70% of the common laborers, but that "most white-collar jobs were found to be largely

[5] *See* the Equal Employment Opportunity Act of 1972, Pub. L. No. 42-261, §§ 2(1), (5), 86 Stat. 103.

inaccessible to minority persons." *Id.*[6] In addition, the Commission found that discrimination against minorities in state and local government employment had been perpetuated through both institutional and overt discriminatory practices. Segregated job ladders, invalid selection techniques, and stereotyped misconceptions regarding minority group capabilities all contributed to the perpetuation of past discrimination. *Id.* Thus, in amending Title VII, Congress concluded that widespread discrimination has prevented blacks from attaining full representation in the public sector work force.

A similarly broad legislative finding provided the constitutional justification for using the affirmative action measures at issue in *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980). In enacting the minority contract set-aside provision, Congress concluded that "private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.* at 503 (Powell, J., concurring). Justice Powell explicitly rejected the need for

[6] Racial disparities continue to threaten "the credibility of the government's claim to represent all the people equally. . . ." 1972 U.S. Code Cong. & Ad. News 2137, 2153. In 1981, the last year for which published figures are available, minority public employees (excluding those in school systems and educational institutions) were more than twice as likely to be found in janitorial and similar service occupations as whites. According to the U.S. Equal Employment Opportunity Commission, 26.9% of the black work force were service/maintenance workers in 1981, while only 12.6% of white workers held those jobs. In contrast, white public employees were more than twice as likely as minorities to work as officials and administrators. In 1981, 6% of all whites held official or administrative jobs while only 2.8% of minorities held similar jobs. *See* U.S. Dept. of Commerce, *Statistical Abstract of the United States*, 1985, at 294, Table No. 476. For a description of job categories, see Equal Employment Opportunities Commission, *Job Patterns for Minorities and Women in State and Local Government*, 1980, App. at 5-6.

a more specific finding of past discrimination noting that "Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties." *Id.* at 502. A broad-based congressional determination of discrimination in public employment plus a determination of underrepresentation in a particular public employer's work force should establish a remedial purpose sufficient to satisfy the compelling interest test.

In addition to the compelling interest of eliminating the vestiges of discrimination in its own work force, the state has a compelling interest in setting an example for private employers and the community. In amending Title VII to include public employers, Congress found that many public agencies perform "governmental activities which are most visible to the minority communities (notably education, law enforcement and the administration of justice)." H.R. Rep. No. 238, *supra*, 1972 U.S. Code Cong. & Ad. News at 2153. The failure of such agencies to eliminate within their own work forces the vestiges of discrimination has "the result that the credibility of the government's claim to represent all the people equally is negated." *Id. See, e.g., Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 695 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (presence of black police officers generates public support and cooperation from the black community and contributes to crime prevention).

Respect and confidence in government is eroded to the extent that public employers are more restricted than private employers in achieving work forces free of the vestiges of discrimination. For this reason, public employers require, at a minimum, parity with the private sector in retaining an array of techniques, including layoff plans designed to maintain prior progress in hiring qualified minorities, to eliminate the vestiges of discrimination.

B. In View of Congress' Finding of Past Discrimination in Public Employment, a Determination by the Public Employer of Minority Underrepresentation in its Work Force Establishes a Remedial Purpose.

In non-employment contexts, Justice Powell would require judicial, legislative, or administrative findings of constitutional or statutory violations to justify remedial race classifications. *Bakke, supra,* 438 U.S. at 307; *Fullilove, supra,* 448 U.S. at 497 (concurring opinion). The purpose of this requirement is to ensure that the remedial purpose behind the racial classification is substantial and well-defined. *Id.* The congressional determination in Title VII that minority underrepresentation in public employment is due to past discrimination ensures that the state interest in remedying such discrimination is substantial.[7] The congressional determination is, however, predicated upon the existence of minority underrepresentation. Thus, any remedial racial classification by a public employer should require a determination that substantial minority underrepresentation exists in its work force.

[7] Justice Powell indicated in *Bakke* that Congress has already made the finding necessary to establish a compelling state interest in remedying past discrimination in employment. Justice Powell stated:

> The presumption in *Griggs*—that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute—was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination. . . . Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

Regents of the University of California v. Bakke, supra, 438 U.S. at 308 n.44. *See United States v. City of Miami, Fla.,* 614 F.2d 1322, 1337 (5th Cir. 1980).

The public employer is well suited to making such a determination.

Minority underrepresentation is the key to demonstrating remedial purpose because it is the key to demonstrating race discrimination. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 (1977) (statistical evidence of minority underrepresentation establishes a *prima facie* case under Title VII); *Village of Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 266 n.13 (1977) (under some circumstances, minority underrepresentation demonstrates a constitutional violation). As this Court has recognized:

> [Racial] imbalance is often a tell-tale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

Requiring public employers to make or obtain a finding that they have violated the constitution or statutes before they may institute affirmative action plans runs contrary to the policy of encouraging voluntary compliance with the law. *See Bakke, supra,* 438 U.S. at 364 (Brennan, J., dissenting in part). Title VII "puts great emphasis on voluntarism in remedial action." *Id.* at 364 n.38. To avoid undue federal regulation of private enterprise, Title VII left intact the private sector's ability to effectuate the goals of the Act voluntarily. *Weber, supra,* 443 U.S. at 206-207. States, even more than private employers, ought to be able to voluntarily accomplish federal government goals. *See United Jewish Organizations of Williamsburg v. Casey,* 430 U.S. 144, 162-163

(1977). State affirmative action is particularly important in the employment discrimination area because Title VII itself reserves for the states the right to enforce the Act through state agencies. *See* 42 U.S.C. § 2000e-5(b)(c) (1976); 1972 U.S. Code Cong. & Ad. News 2137, 2154.

In any event, public employers should not be forced to admit they intentionally discriminated in the past before they may initiate affirmative action plans. Such a concession could give rise to Title VII claims from past victims. *See Van Aken v. Young*, 541 F. Supp. 448, 451 (E.D. Mich. 1982), *aff'd*, 750 F.2d 43 (6th Cir. 1984). Moreover, requiring more than underrepresentation to establish remedial purpose places public employers on the tightrope described by Judge Wisdom in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting):

> On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action.

Accordingly, minority underrepresentation alone should be sufficient to establish the remedial purpose of a public employer's affirmative action plan given the findings of Title VII.[8] This result encourages voluntary remedial action and allows public employers to avoid Titie VII liability.

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[8] This brief does not address the proper measure of underrepresentation in the circumstances of this case.

II. A COLLECTIVELY BARGAINED PROVISION DESIGNED TO RETAIN UNDERREPRESENTED MINORITIES BY LIMITING MINORITY LAYOFFS IS NARROWLY TAILORED TO ITS REMEDIAL PURPOSE.

Layoff provisions which are narrowly tailored to their remedial purpose are permissible under both Title VII and the Constitution. When such provisions are the product of collective bargaining they should be presumed to be narrowly tailored. Furthermore, such provisions are the only means for protecting minority hiring gains and do not unnecessarily trammel the interests of white employees.

A. The Tailoring Tests for Affirmative Action Plans Are Functionally Equivalent for Private Employers Under Title VII And Public Employers Under the Constitution Because the Policy Concerns Under Both Tests Are the Same.

Once a compelling government interest is established, a reviewing court must then determine whether the race-conscious program uses a constitutionally appropriate means of serving that interest. *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). This Court has not required remedial plans "to be limited to the least restricted means of implementation." *Id.* at 508. Rather, "choice of remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination." *Id.* at 510. Factors to consider in determining the reasonableness of any affirmative action plan include: the efficacy of alternatives, the duration and flexibility of the plan, the goal of the plan in relation to the percent of minorities in the

relevant labor force, and the effect of the plan on innocent parties. *Id.* at 510-11.

The analysis under the equal protection clause is functionally equivalent to factors considered in a Title VII analysis. Because remedial race-conscious layoffs survive a Title VII analysis, they should also survive analysis under the equal protection clause. The issue under both is whether the means adopted to implement the remedial purpose are sufficiently tailored. In an equal protection clause analysis, "the means selected must be narrowly drawn to fulfill the governmental purpose." *Id.* at 498 (Powell, J., concurring). In the Title VII context, the means must "not unnecessarily trammel the interests of the white employees," and be temporary. *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). The function of both tests is clearly to assure that the interests served by remedial race-conscious remedies could not be served equally well by "less intrusive means." *Fullilove*, 448 U.S. at 510 (Powell, J., concurring). Factors applied in Title VII cases addressing the scope of race-conscious hiring remedies have been considered in the context of cases under the equal protection clause. *Id.*

The legislative history of the 1972 amendments to Title VII (the Equal Employment Opportunity Act of 1972) underscores the functional equivalency of the equal protection clause and Title VII analyses. In enacting the 1972 Equal Employment Opportunity Act, Congress believed that

> the expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.
>
> Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill. Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated "under color of state law" as embodied in the Civil Rights Act of 1871, 42 U.S.C. §1983.

H.R. Rep. No. 238, *supra*, 1972 U.S. Code Cong. & Ad. News at 2154.

Because constitutional and statutory analyses of voluntary remedial race-conscious actions in the employment context serve the same functions, a number of courts have arrived at the same result under both analyses and recognized the lack of substantial distinction between them.[9] In *Kromnick v.*

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[9] The argument that remedial racial classifications satisfying Title VII should also satisfy the equal protection clause is not diminished by this Court's holding in *Washington v. Davis*, 426 U.S. 229 (1976). *Davis* held that the constitutional and statutory proof requirements differ when a minority challenges neutral practices with substantially disproportionate racial burdens. Proof of discriminatory purpose is required under the equal protection clause, *id.* at 239, but not under Title VII. *Id.* at 246-47. The Court in *Davis* was concerned that the absence of a discriminatory purpose requirement under the equal protection clause might invalidate a number of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the average black than the more affluent white. *Id.* at 248. In contrast, acknowledging the functional equivalency of equal protection clause and Title VII standards in reviewing remedial racial classifications does not endanger the validity of a whole range of statutes.

School District of Philadelphia, 739 F.2d 894 (3rd Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 782 (1985), the court upheld under both the Constitution and Title VII a collectively-bargained race-conscious teacher transfer progam to remedy racial imbalance. In *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 976 (1st Cir. 1982), *vacated and remanded for reconsideration of mootness*, 461 U.S. 477 (1984), the court recognized that race-conscious layoffs to overcome the vestiges of discrimination are permissible under the Constitution and Title VII. In *Hammon v. Barry*, 606 F. Supp. 1082, 1097 (D.D.C. 1985), the court observed the development of a "merging of Constitutional and Title VII considerations" in judicial evaluation of race-conscious remedies. *See also Baker v. City of Detroit*, 504 F. Supp. 841, 848 (E.D. Mich. 1980), *app. sub nom., Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 703 (1984) (*Weber* test should be extended to reverse discrimination claims brought under the fourteenth amendment); Case Comment, *Bratton v. City of Detroit*, 17 Akron L. Rev. 473, 480 (1984); Kreiling & Mercurio, *Beyond Weber: The Broadening Scope of Judicial Approval of Affirmative Action*, 88 Dick. L. Rev. 46, 79 (1984); Jacobs, *Justice Out of Balance: Voluntary Race-Conscious Affirmative Action in State and Local Government*, 17 The Urban Lawyer 1, 25 (1985).

In *Weber, supra*, this Court set forth the factors to consider in deciding whether a particular affirmative action plan

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Moreover, the distinction drawn in *Davis* had little practical effect on minority public employees alleging race discrimination because, after 1972, they could bring their claims under Title VII. Public employers, however, have no choice of what provision—constitutional or statutory—under which they will be sued. Thus, recognizing that either analysis should arrive at the same resu t places public and private employees on an equal footing.

is permissible under Title VII. 443 U.S. at 208. These factors should also determine whether a public employer's affirmative action plan is permissible under the Constitution. Collectively bargained layoff provisions which retain underrepresented minorities meet the *Weber* criteria.

First, such layoff provisions are "designed to break down old patterns of racial segregation and hierarchy," *id.* at 208, and to "eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 209. This requirement is the same remedial purpose requirement analyzed under equal protection. Minority underrepresentation is the clearest indication of racial segregation and hierarchy. *See e.g., Setser v. Novak Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981). Layoff provisions designed to retain underrepresented minorities should be presumptively remedial.

Second, such provisions do "not unnecessarily trammel the interests of the white employees." *Weber, supra*, 443 U.S. at 208. These provisions do not require layoffs of white employees. They merely permit layoffs if declining demand, financial considerations or other factors so require. These provisions do not require only whites to bear the burden of layoffs. Minority employees are subject to termination within the traditional "last-hired, first-fired" seniority system whenever such layoffs do not decrease the proportion of minority employees. Nor do such provisions erode any legitimate interest of white employees, who do not have a constitutionally

protected or contractual interest in layoffs by reverse order of seniority.[10]

Third, such provisions are temporary measures, which expire together with other contract provisions at the termination of the agreement. Usually, there is no contractual provision for automatic renewal of the layoff plan in subsequent contracts. The temporary nature of the measure is demonstrated in the *Jackson* case by the rehire of seven of the eight petitioners. Petitioner's Brief at 7.

The permissible limits of affirmative action plans are the same for public employers under Title VII and the Constitution. This Court should explicitly recognize this equivalency to assure public employers that their obligations in enacting affirmative action provisions are the same under both governing provisions. Furthermore, collectively bargained layoff provisions which retain underrepresented minorities are permissible under Title VII and hence under the Constitution.

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[10] This factor is one of many which distinguishes this case from *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S. Ct. 2576 (1984). There the Supreme Court held that section 703(h) of Title VII barred a district court from ordering race-conscious layoffs to protect black hirees who had been the beneficiaries of a prior remedial consent decree that did not itself limit seniority rights. Section 703(h), which protects bona fide seniority plans, is inapplicable where the employer and union agree on a modified seniority layoff system to accommodate affirmative action. In such cases there is no seniority override. *See e.g., Kromnick v. School District of Philadelphia, supra*, 739 F.2d at 911.

B. Collectively Bargained Layoff Plans Should be Presumed to be Narrowly Tailored.

It is particularly appropriate to permit remedial race-conscious layoff plans by public employers when the plans are collectively bargained.

This Court accords deference to collectively bargained agreements. The "collective bargaining process 'lies at the core of our national labor policy' " and national policy favors "minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76-77 (1982) (citations omitted). This Court has also recognized that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems," *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980), and that

> [A] collective bargaining agreement may . . . [e]nhanc[e] the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement.

Franks v. Bowman, 424 U.S. 747, 778-79 (1976).

A layoff provision which is the product of collective bargaining can be presumed to be narrowly tailored in that it is subject to change at regular intervals. In addition, such agreements are the product of a voluntary, democratic process in which the union is charged with representing the interests of white employees. *Cf. Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S. Ct. 2576, 2586 (1984) (consent decree could not be modified by court order partly because

union and non-white employees did not have opportunity to agree to layoff provision).

The challenged racial classification is subject to approval by union members and an elected school board. *See* Mich. Comp. Laws § 380.211. Union officials in a democratically operated union and popularly elected members of a school board run the risk of losing membership or voter support for proposing or urging provisions that cut deeply into public perceptions of fairness. Thus, the approval mechanisms for the challenged layoff plan serve to ensure its narrow tailoring.

C. Race-Conscious Layoffs are Necessary to Maintain Minority Hiring Gains.

The only way to preserve recent minority hiring gains when layoffs are required is to depart from the traditional "last-hired, first-fired" seniority system. Clearly, "it is vital that affirmative action hiring practices involve some degree of job security. Without some correlative job protection, the familiar last-hired, first-fired policy is likely to make any gains shortlived." Sherman, *Affirmative Action: Case for Substantive Labour Law*, 19 Val. U.L. Rev. 95, 108 (1984); *see also* Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1603-4 (1969) (continuation of traditional seniority system perpetrates racial discrimination when lack of minority seniority is product of racial discrimination). No practical alternative exists for protecting affirmative action hiring gains when layoffs are required other than by making race-conscious layoffs.

The challenged layoff provision, like the layoff provision in Minnesota's contract (see Appendix A), does not seek to

increase the proportion of minorities but merely to maintain the current level of minorities in the work force. The limited goal serves to minimize the number of whites harmed by the layoff provision.

That some whites must share the burden of layoffs is not fatal to a racial classification. In *Fullilove*, the Court explained that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." *Fullilove*, 448 U.S. at 484 (citation omitted). The burden on whites is then clearly permissible because it is an unavoidable consequence of furthering a compelling state interest with narrowly tailored means.

The challenged provisions are a necessary means of retaining currently underrepresented minorities in the work force, they impose only temporary burdens on innocent whites, and have been filtered through the collective bargaining and political processes to assure fairness. Therefore, the challenged provisions are sufficiently tailored under the equal protection clause and should be permitted.

CONCLUSION

A public employer's race-conscious layoff plan designed to retain recently hired minorities who are underrepresented in the employer's work force serves the remedial purpose of eliminating the vestiges of racial discrimination and is narrowly tailored to accomplish that purpose. Such a plan satisfies the strict scrutiny test of the equal protection clause.

Dated: August 23, 1985.

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APPENDIX

APPENDIX A

Article 17, § 14 of the General Professional Labor Agreement between the Minnesota Association of Professional Employees and the State of Minnesota, July 1, 1983-June 30, 1985, provides:

> *Section 14. Affirmative Action.* In accomplishing a layoff pursuant to this Article, the Appointing Authority may deviate from the layoff procedure provided in this Article whenever such layoffs would conflict with established goals and objectives of the State's Affirmative Action/Equal Opportunity program or where the published goals of the Affirmative Action/Equal Opportunity program have not been met in a specific seniority unit by protected group as defined in Minnesota Statutes 43A.02, Subdivision 33.
>
> In seniority units where the goals and timetables of the Affirmative Action/Equal Opportunity program have not been met, seniority shall be used in layoff, except that *in no event shall the percentage of employees laid off in protected groups be greater than the percentage of all employees to be laid off in the same seniority unit.* In the event that the layoff would cause the layoff of employees with greater than three years seniority in the classification being reduced in the seniority unit then the provisions of this Section shall not be applied to the layoff of those employees (emphasis added).

Article VIII, § 2(C)(1)(2) of the Agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, October 30, 1983 - June 30, 1985, provides:

(C) Employees within the employing unit within the same class shall be ranked by seniority as defined in Article V, Section 1 with the least senior employe laid off first, except that the Employer may exercise one of the two following options:

(1) *The Employer may lay off out of line seniority to maintain a reasonable affirmative action program* or where there is a demonstrable need for special skills. The Employer shall provide the Union with information relating to the exercise of these exemptions if so requested.

(2) The Employer may exempt 5% of the employes within an employing unit within the same class from the layoff procedure; however, such 5% shall not be less than one person (emphasis added).

APPENDIX B

Cal. Gov't Code § 19798 (West 1980) provides:

§ 19798. Order and subdivisions of layoff and reemployment; effect of past discriminatory hiring practices

In establishing order and subdivisions of layoff and reemployment, the [state personnel] board, when it finds past discriminatory hiring practices, shall by rule, adopt a process that provides that the *composition of the affected work force will be the same after the completion of a layoff, as it was before the layoff procedure was implemented* (emphasis added).

Wis. Stat. § 230.34(2)(a)(b) provides as follows:

(2) Employes with permanent status in class in permanent, sessional and seasonal positions in the classified service and employes serving a probationary period in

such positions after promotion or transfer may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization but only after all original appointment probationary and limited term employes in the classes used for layoff, are terminated.

(a) The order of layoff of such employes may be determined by seniority or performance or a combination thereof *or by other factors.*

(b) The administrator shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion and the exercise of a displacing right to a comparable or lower class, as well as the subsequent employe right of restoration or eligibility for reinstatement (emphasis added).

Wisc. Admin. Code Division of Personnel ER-Pers 22.06 (1)(2) provides as follows:

ER-Pers 22.06 Procedure for making layoffs. (1) The appointing authority shall identify the class, the class subtitle as approved by the administrator at the time of layoff, or the classification progression series approved by the administrator, in which layoff is to occur, hereafter called the layoff group. Full-time and part-time positions may constitute different layoff groups.

(2) The appointing authority may exempt from the layoff group up to 2 employes or 20%, whichever is greater, of the number of employes in the layoff group to retain employes having special or superior skills or for other such purposes as may be determined by the appointing authority. In addition, *for affirmative action purposes, the appointing authority may exempt female,*

minority and handicapped employes in the layoff group in a manner that retains the proportional representation of each of these groups in the layoff group. In applying the percentages for these exemptions, any fraction may be rounded to the next whole number. Exercise of these exemptions shall be declared by the appointing authority as part of the layoff plan submitted under ER-Pers 22.05 (emphasis added).

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No. 84-1340

In the
Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, ET AL.,
PETITIONERS,

v.

JACKSON BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of Amici Curiae, The Greater Boston Civil Rights Coalition, and The Civil Liberties Union of Massachusetts, in Support of Respondents

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INTEREST OF AMICI CURIAE

Interest of Greater Boston Civil Rights Coalition

The Greater Boston Civil Rights Coalition (the "Coalition") is a multi-racial, multi-religious and multi-ethnic, voluntary, unincorporated association of 35 Boston area civil rights organizations, governmental representatives and community organizations. For the past six years, the Coalition has led efforts to end race discrimination in education and employment and to combat racial violence.

The Coalition views voluntary affirmative action as a critical means to achieve its goal of creating racial, religious, and ethnic harmony and equality.

The Coalition was organized in 1979, after a group of white youths shot and paralyzed Darryl Williams. This racial attack was one in a long series of incidents of

racial violence that grew out of the tensions created from court-ordered desegregation. The arduous history and violent aftermath of court-ordered desegregation in Boston has reinforced the importance of creating voluntarily-negotiated remedies for discrimination.

Following his election, Governor Michael S. Dukakis held a series of meetings with the Coalition to structure his Administration's programs for equal employment opportunity. As a result, the Commonwealth of Massachusetts adopted Executive Order 227, which set minority hiring goals of 20% for racial minorities and 50% for women. The Governor established a Civil Rights Working Group of key officials in his administration who had responsibility for programs which affect race relations and economic opportunity. The Governor

appointed a member of the Coalition as the only non-governmental representative on this body. (A letter from Governor Dukakis concerning work with the Coalition is attached as Appendix A.)

Similarly, the Coalition has worked with the City of Boston for strong voluntary affirmative action in city employment. Following his election, Mayor Raymond L. Flynn met with the Coalition to discuss his administration's civil rights programs. As a result of these discussions, the Flynn Administration created a city office of affirmative action and adopted an affirmative action plan with hiring goals of 30% for racial minorities and 50% for women in all jc' categories. (A letter from Mayor Flynn concerning the Coalition is attached as Appendix B.)

The Coalition has also been active in educational efforts. It has supported implementation of the Boston school desegregation orders, and has worked to eliminate racial prejudice through educational efforts within the schools and in the community at large.

Interest of Civil Liberties Union of Massachusetts

The Civil Liberties Union of Massachusetts ("CLUM") is a non-profit membership organization whose purpose is the preservation and promotion of the civil rights and liberties guaranteed by law. CLUM has long been involved in the struggle to combat racial discrimination, both in education and employment, and to implement affirmative action plans that can meaningfully remedy racism's continuing effects.

In the early and mid-1970's CLUM was active in efforts to enforce the Massachusetts racial imbalance law (Mass. Gen. Laws ch. 71 §37D), a statutory attempt to remedy longstanding patterns of racial segregation in the public schools. CLUM participated as amicus curiae in two cases involving application of the law to school segregation in the City of Springfield.[1]

Resistance to desegregation under the racial imbalance law, and continuing defiance of constitutional mandates by public officials, ultimately led to court-ordered desegregation in Boston and to a horrifying era of racial violence from which the City has still not yet fully recovered.[2] This

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[1] School Committee of Springfield v. Board of Education, 365 Mass. 215 (1974), 366 Mass. 315 (1974), cert. denied, 421 U.S. 947 (1975).

[2] See School Committee of Springfield, supra, 366 Mass. at 325-338; Smith, "Two Centuries and Twenty-Four Months: A Chronicle of the Struggle

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experience has given CLUM and other Massachusetts civil rights organizations a unique understanding of the importance of voluntarily-negotiated remedies for the lingering effects of past discrimination.

CLUM has continued to support affirmative action remedies, public and private, voluntary and court-imposed, through lobbying, education, and participation in litigation.[3]

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[2] (Footnote Continued From Previous Page)

to Desegregate the Boston Public Schools," in Limits of Justice: The Courts' Role in School Desegregation, 25-113 (H. Kalodner & J. Fishman eds. 1978).

[3] See, e.g., Firefighters Union, Local 718 v. Boston Chapter, NAACP, 461 U.S. 477 (1983); Devereaux v. Geary, No. 84-2004, slip op. (1st Cir. June 24, 1985).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with an issue left unanswered by such cases as United Steelworkers of America v. Weber, 443 U.S. 193, 99 S.Ct. 2721 (1979) and Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978): whether a voluntary plan to safeguard achievements in remedying substantial and chronic underrepresentation of minority faculty, adopted in collective bargaining with a public employer, in the absence of a judicial or legislative finding of past discrimination, is consistent with the Equal Protection Clause of the Fourteenth Amendment. This issue is of paramount importance, as state and local governments have emerged to account for ever-greater percentages of total employment in the United States. Most Federal

circuit courts have upheld public affirmative action plans by applying the intermediate scrutiny standard articulated by Justices Brennan, White, Marshall and Blackmun in Bakke,[4] together with an extension to public employers of Weber's holding that no finding of past discrimination is necessary for a private employer voluntarily to adopt affirmative action measures[5] (see infra). Amici urge this Court to adopt this standard of constitutional review, which appropriately permits plans such as that collectively adopted by the Jackson Board of Education and its

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[4] Under this standard, a govermental racial classification designed to further remedial purposes will be upheld upon Equal Protection review if it (1) serves an important governmental objective and (2) is substantially related to achievement of this objective. Bakke, 438 U.S. at 359.

[5] Weber, 443 U.S. at 200.

teachers. It is critical that public employers share with private employers the ability voluntarily to "eliminate traditional patterns of racial segregation." Weber, 443 U.S. at 201. Moreover, the affirmative retention provision in this case should be upheld under the strictest standard of constitutional review.[6] However, Amici submit that the strictest standard of constitutional scrutiny does not apply here because (1) this plan was voluntary and bilateral, not imposed by unilateral state action, thus distinguishing it from Bakke; (2) governmental action to

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[6] Under the strictest standard of constitutional scrutiny, a state racial classification does not violate the Equal Protection Clause of the Fourteenth Amendment if it is "a necessary means of advancing a compelling governmental interest." Fullilove v. Klutznick, 448 U.S. 448, 496, 100 S.Ct. 2758 (Opinion of Powell, J., concurring), citing Bakke, supra, 438 U.S. at 299.

safeguard the equal employment opportunities of minorities in occupations traditionally closed to them furthers the purpose of the Fourteenth Amendment; (3) a different constitutional analysis is required when the claimants are not members of a class historically subject to discrimination; and (4) the history of Congressional and Supreme Court policy encouraging local governmental (and private) voluntary remedial action dictates a standard of review that permits such voluntary local action.

This case is doubly important because it arises in the context of public schools. As will be argued below, the goals of the affirmative retention provision at issue here were school desegregation goals as well as affirmative employment goals, tailored to the needs of school

children. Desegregating faculties is a compelling government interest, if the nation's public school children are to grow up free of the burden and stigma of racial segregation. Minority teachers provide vital and irreplaceable role models for minority children, and bring a unique and necessary diversity to public education.

I. THE STRICTEST LEVEL OF CONSTITUTIONAL SCRUTINY DOES NOT APPLY TO VOLUNTARY AFFIRMATIVE RETENTION PROVISIONS ADOPTED IN COLLECTIVE BARGAINING AGREEMENTS BETWEEN PUBLIC EMPLOYERS AND EMPLOYEES.

Amici submit that the strictest level of constitutional scrutiny is not appropriate to affirmative retention provisions adopted in collective bargaining agreements between public employers and employees.

A. Strict Scrutiny Does Not Apply Because this Affirmative Retention Provision Was Entered into Voluntarily and Bilaterally.

This Court has never applied the strictest level of scrutiny to affirmative action plans with express remedial purposes, voluntarily entered into by the affected class. The admissions program in Bakke was, although voluntary, unilateral state action. It did not have the express agreement of the affected class of student applicants. The plan in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____, 104 S.Ct. 2576 (1984), was court-imposed, and encroached on an existing seniority system, whereas here the disputed provision was collectively bargained for and ratified numerous times by the teachers' union, and

is in derogation of no existing independent seniority system.[7]

Analysis of this affirmative action plan must begin with the fact that it was bilaterally entered into by the Jackson Board of Education and the union representing the City's teachers, the Jackson Education Association. The plan was ratified in 1972, and the provision at issue was retained in successor collective bargaining agreements ratified in 1973, 1975, 1977, 1980, 1983, and 1985.

The bilateral nature of the plan is of decisive importance. Voluntariness on the part of the teachers renders applicable the

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[7] The voluntariness of the plan on the part of the teachers is not in issue. And see, e.g., Tangren v. Wackenhut Services, 658 F.2d 705, 707 n.2 (9th Cir. 1981) (viewing a collectively-bargained affirmative retention plan as plainly voluntary and the "question of voluntariness as a false issue") (emphasis added).

policy considerations of Weber, and diminishes the importance of the state action found in such cases as Bakke. This is not a case where a governmental entity such as the Board of Regents in Bakke unilaterally imposed a preferential admissions program without the agreement of student applicants. Here, the teachers themselves have ratified the plan seven times. The teachers' union has even instituted litigation to enforce the very layoff provisions now under attack, Jackson Education Association v. Board of Education of the Jackson Public Schools, Civil Action No. 4-7234D (E.D. Mich. 1974), and has successfully prosecuted a state court action which upheld the validity and constitutionality of the layoff clause. Jackson Education Association v. Board of Education of the Jackson Public Schools, Jackson County Cir.

Ct. No. 77-011484(Z) (1977) (Joint App. 39-53). Thus, the teachers of Jackson have collectively ratified and sought to enforce this layoff provision against the very board that defends the provision as Respondent here.

The board which was compelled by the Jackson teachers' union to apply the layoff provision at issue is now under attack for having done so. Such litigation threatens to forestall or even to cripple the ability of public employers and employees to achieve voluntary racial desegregation and remedial affirmative action.

As Justice Brennan noted in Bakke:

> Our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

Id., 438 U.S. at 361.[8] Application of the strictest standard of constitutional review in the context of public collective bargaining agreements would in effect make judicial intervention "a prerequisite to action," and deprive one of the country's largest employment sectors of the power voluntarily to "eliminate traditional patterns of racial segregation." Weber, 443 U.S. at 201.

[8] See also United States v. City of Miami, 614 F.2d 1322, 1342 (5th Cir. 1980) ("As we see it, the best hope is provided by negotiation and compromise among all affected persons and parties. Where minorities and women have been underrepresented in the past . . . even those innocent of any wrongdoing must temporarily bear some of the burden" (emphasis added).

B. Strict Scrutiny Does Not Apply Because Governmental Action to Safeguard the Equal Employment Opportunities of Minorities in Occupations Traditionally Closed to Them Furthers the Purpose of the Fourteenth Amendment.

In Weber, this Court determined that Congress, in enacting Title VII of the Civil Rights Act of 1964,[9] "did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." Id., 443 U.S. at 207. Furthermore, the affirmative action plan in Weber was held to "mirror" the purposes of Title VII. Weber, 443 U.S. at 208 (Brennan, J., delivering the Opinion of the Court) (emphasis added). It would be anomalous for state and local governments to be deprived of goals and powers which Congress

[9] 42 U.S.C. §2000e et seq.

can permissibly give to private employers, each in the name of Equal Protection. Such disparate treatment of public and private collective bargaining agreements could give rise to cynicism as to the very goals which the Fourteenth Amendment and Title VII further. If voluntary affirmative action plans by private employers mirror the purposes of Title VII, and if the purposes of Title VII further those of the Fourteenth Amendment, then public voluntary affirmative action plans must be held to further the purposes of the Fourteenth

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[10] In the Equal Employment Opportunity Act of 1972, Congress amended Title VII to bring public and educational employees within its scope. The legislative history shows that Congress amended Title VII pursuant to its power to enact "appropriate legislation" under Section 5 of the Fourteenth Amendment to carry out the Amendment's purposes. According to the House Report that accompanied the bill,

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the

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Amendment.[10] Otherwise government will be perceived as hypocritical in its fur-

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> Constitution . . . . The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination. Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill.

H.R. Rep. No. 238, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2154 (emphasis added). Senator Javits agreed:

> Of all the provisions in the bill, this has the most solemn congressional sanction, because it is based not on the commerce clause but ... on the Fourteenth Amendment. This is a paramount right created for all Americans.

S. Bill No. 2515, 92d Cong., 2d Sess., reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, Bureau of National Affairs, Inc. at 1173 (1973). Senator Williams was also in accord. Id. at 1115.

Congress' purpose in applying Title VII to the public sector to further the purposes of the Fourteenth Amendment was the same as its purpose in enacting Title VII originally: to open employment opportunities for minorities in occupations traditionally closed to them.

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therance of the Fourteenth Amendment: what Congress strives to achieve, local governments may not; what private employers may achieve in the furtherance of constitutionally permissible objectives, public employers may not.

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Weber, 443 U.S. at 203. Congress' reason for extending Title VII to educational institutions was that, as Representative Perkins stated in support of the amendment, "discrimination against minorities... is as pervasive in the field of education as in any other area of employment." H.R. Bill No. 1746, 92d Cong., 2d Sess. (1972), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, supra, at 301. As Senator Javits argued in support of the amendment, quoting from the U.S. Commission on Civil Rights' 1969 Report on Equal Opportunity in State and Local Government (Exhibit 1 to the Legislative Record of the 1972 amendment): "state and local governments have failed to fulfill their obligation to assure equal job opportunity." S. Bill No. 2515, supra, at 1173. These are remedial, Fourteenth Amendment purposes. The public voluntary affirmative retention plan here must therefore be held to mirror not only the purposes of Title VII, as in Weber, but also the purposes of the Fourteenth Amendment, under the aegis of which Congress extended Title VII to public employers and educational institutions.

Public employers must be allowed, consistent with the Fourteenth Amendment, to adopt the same goals and to enter into the same voluntary affirmative action plans as private employers. Indeed, because state governments are charged by the Fourteenth Amendment to carry out its remedial function, arguably governments should have more, not less, freedom to implement affirmative action programs. To make public employment versus private employment the dividing line between impermissible and permissible voluntary affirmative action plans is anomalous and constitutionally indefensible.

C. Strict Scrutiny Does Not Apply Because the Petitioners Are Not Members of a Class Historically Subject to Discrimination.

Where the parties claiming discrimination are not members of a class historical-

ly subject to discrimination, the Constitution does not require that strictest level of scrutiny which has been called "'strict' in theory and fatal in fact." Bakke, 438 U.S. at 361-62 (Brennan, J.)[11] As the

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[11] When evaluating a group's claim of entitlement to special judicial protection, this Court has in the past "emphasized the characteristics of that class, referring frequently to the 'traditional indicia of suspectness': whether the class is 'saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the ... political process.' San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); see Graham v. Richardson, 403 U.S. 365, 372 (1971); United States v. Carolene Prods. Co.. 304 U.S. 144, 152 n.4 (1938). Repeatedly the Court has refused to apply strict scrutiny where these characteristics are absent. See, e.g., Johnson v. Robinson, 415 U.S. 361, 375 n.14 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. I, 28 (1973). See also Kahn v. Shevin, 416 U.S 351, 357 (1974) (Brennan, J., dissenting)...." The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57 (1978) (emphasis added). Clearly, petitioners here have none of the "traditional indicia of suspectness" which would require the strictest scrutiny.

Sixth Circuit stated in Detroit Police Officers' Association v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981):

> [A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain. . . .

Id., 608 F.2d at 697 (emphasis added). Indeed, in those cases where Federal circuit courts nominally apply "strict scrutiny" to affirmative action programs,

most courts in fact apply the standard articulated in Justice Brennan's opinion in Bakke, together with Weber's holding that no specific finding of past discrimination by a particular employer is necessary, to uphold such programs against constitutional attack.[12]

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[12] See, e.g., Kromnick v. School District of Philadelphia, 739 F.2d 894, 903 (3rd Cir. 1984); Kirkland v. New York State Department of Correctional Services, 711 F.2d 1117, 1130-32 (2d Cir. 1983), cert. denied, 104 S.Ct. 997 (1984); Bratton v. City of Detroit, 704 F.2d 878, 884 n.18 (6th Cir. 1983), cert. denied, 104 S.Ct. 703 (1984), reh'g. denied, 104 S.Ct. 1431 (1984); La Riviere v. Equal Employment Opportunity Commission, 682 F.2d 1275, 1278-79 (9th Cir. 1982); Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1981); Local Union No. 35 v. City of Hartford, 625 F.2d 416, 432 (2d Cir. 1980), cert. denied, 453 U.S. 913 (1980); Detroit Police Officers' Association v. Young, supra.

In the few Federal court cases concerning collective bargaining agreements, strictest scrutiny has not been applied. See, e.g., Marsh v. Board of Education, 581 F. Supp. 614 (E.D. Mich. 1984), aff'd., 762 F.2d 1009 (6th Cir. 1985) (upholding collective bargaining agreement implemented to remedy "substantial underrepresentation" and employing "reasonable" remedial

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Amici urge that these courts are correct in upholding public voluntary affirmative action programs by applying standards of review less strict than the standard applied to claims by persons who are members of a class historically subject to discrimination.

D. The History of Congressional and Supreme Court Policy Encouraging Voluntary Local Governmental and Private Remedial Action Dictates a Standard of Review that Permits Such Action.

It is the clear policy of the courts and of Congress to encourage local, voluntary efforts to remedy the lingering effects of a history of racial discrimina-

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plan); Britton v. South Bend Community School Corp., 593 F. Supp. 1223 (N.D. Indiana 1984) (upholding collective bargaining agreement's "no minority lay-off" clause which was "reasonably related" to "important governmental objective" of "remedying the racial imbalance among teachers").

tion. As the Court stated in Green v. County School Board, 391 U.S. 430, 437-38, 88 S. Ct. 1689, 1693-94 (1968), discussing the import of Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954): "School boards... were... clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" (citations omitted) (emphasis added). Titles VI and VII of the Civil Rights Act of 1964 "put great emphasis on voluntarism in remedial action." Bakke, 438 U.S. at 364 n. 38. Congress extended Title VII of that Act to state and local governments in 1972, and expressly intended this extension to encourage local governments to correct minority underrepresentation in furtherance of the purposes of the 14th Amendment. See

Section I.B., supra. A primary purpose of the Emergency School Aid Act was "to encourage 'the voluntary elimination, reduction or prevention of minority group isolation'" in public schools, including the racial isolation of faculties. Board of Education v. Harris, 444 U.S. 130, 132-33, 100 S. Ct. 363, 365 (1979).

It is thus essential to permit and to encourage state and local government's voluntary affirmative action programs. These programs are based on clear Congressional policy favoring local, voluntary action,[13]

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[13] As Representative MacGregor stated in his remarks to the House shortly before the final vote on Title VII of the Civil Rights Act of 1964: "[P]roblems raised by these controversial questions [e.g., preferential treatment in employment] are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." 110 Cong. Rec. 15893 (1964), quoted in Weber, 443 U.S. at 208, (Blackmun, J., concurring) (emphasis added). See also the House Report accompanying the Civil Rights Act: "There is reason to believe... that national leadership

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and on this Court's prior interpretations of the race-conscious and remedial purposes of the Thirteenth and Fourteenth Amendments.

II. THE AFFIRMATIVE RETENTION PROVISION IS CONSISTENT WITH THE EQUAL PROTECTION CLAUSE UNDER THE APPROPRIATE STANDARD ARTICULATED BY JUSTICE BRENNAN IN BAKKE.

If anything has been established by the judicial history of racial desegregation and affirmative action, it is that, as Justice Blackmun stated in Bakke, "[i]n order to get beyond racism, we must first take race into account . . . and in order

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provided by enactment of [the Civil Rights Act] will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." H.R. Rep. No. 914, 88th Cong., 1st Sess. 1, p. 18 (1963), as quoted in Weber, 443 U.S. at 204, (Brennan, J., delivering the Opinion of the Court).

to treat some persons equally, we must first treat them differently." Id. 438 U.S. at 40. A majority of the Justices of this Court have, in Bakke and in Fullilove v. Klutznick, 448 U.S. 448, 100 S.Ct. 2758 (1980), opined that not every race-conscious measure is constitutionally impermissible, and that states may implement voluntary plans to eradicate the effects of past discrimination. Indeed, as Justices Brennan, White, Marshall and Blackmun noted in Bakke, "no decision of this Court has ever adopted the proposition that the Constitution must be colorblind." Bakke, 438 U.S. at 336.

In Bakke, four out of five Justices who reached the constitutional issue concluded that "racial classifications designed to further remedial purposes... must serve important governmental objec-

tives and must be substantially related to achievement of those objectives." Id., 438 U.S. at 359. Amici urge that these two constitutional requirements are the appropriate standards in this case. They will be addressed in turn.

A. The Affirmative Retention Provision Serves an Important Governmental Objective and Meets the Appropriate Standard of Constitutional Review.

In Bakke, Justice Brennan wrote that "our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large." Id., 438 U.S. at 369. According to Justice Brennan, the goal of

remedying the effects of past discrimination, even in the absence of official findings of past discrimination, is constitutionally permissible, so long as "there is a sound basis for concluding that minority underrepresentation is substantial and chronic...." Id. at 362. Under this standard, the affirmative retention program at issue clearly serves an important governmental objective, and thus meets the appropriate standard of constitutional "ends" review.[14]

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[14] As argued above, it is crucial that this case involves a collectively-bargained affirmative retention clause. In the only Federal cases addressing the constitutionality of such collectively-bargained plans, the "substantial and chronic underrepresentation" standard has been applied to uphold "affirmative retention" clauses similar to that here. In Britton, supra, the court relied on Justice Brennan's test in Bakke, i.e., "that an articulated purpose or plan serve an important governmental objective." Id., 593 F. Supp. at 1229, citing Bakke, 438 U.S. at 361. Relying on Bakke, the District Court took the position that Amici urge here: that the constitutional review of the

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As argued above, most Federal circuit courts have properly upheld public affirmative action programs by applying Justice Brennan's standard in Bakke, together with Weber's holding that no finding of past discrimination is necessary. See Section I.C., supra.

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"ends" of an affirmative retention plan collectively bargained-for is satisfied if the Court finds that "there is a sound basis for concluding that minority underrepresentation is substantial and chronic...." Id. at 1230 (emphasis added).

The Britton court properly refused to "read Stotts, supra, to require direct findings of discrimination in a voluntary affirmative action plan." Britton at 1230. Where the "'no minority layoff clause' in the collective bargaining agreement . . . was approved by the [teachers' union] not once but twice," the court properly found Stotts inapplicable. Id. at 1230-1231. The Court required only "some showing of previous underrepresentation of minorities. . . ." Id. This standard is proper for collectively-bargained plans, and is clearly met by the record in Wygant. Amici urge application of this standard, where the affirmative retention provision in Wygant has been ratified by the teachers not twice, but seven times. See also Marsh, supra, 581 F. Supp. at 620-22.

In the leading case of Detroit Police Officers' Association v. Young, supra, the Sixth Circuit applied this standard to uphold the constitutional validity of an affirmative promotions policy voluntarily adopted by the Detroit Police Department. Id., 608 F.2d at 687.

The court concluded that the police department's finding that minority underrepresentation on the force was substantial and chronic was sufficient to justify the use of a unilaterally-imposed affirmative promotions policy. Quoting Bakke, 438 U.S. at 362, the Sixth Circuit held that an important government interest is established if there is "a sound basis for concluding that minority under-representation is substantial and chronic...." Young, 608 F.2d at 694.

No judicial finding of past discrimination was required. To require a judicial determination of past discrimination prior to institution of a voluntary plan "would be 'self-defeating' and would 'severely undermine' voluntary remedial efforts." Young, supra, 608 F.2d at 689-90, quoting Bakke, 438 U.S. at 369 (emphasis added).[15]

The record in this case shows that prior to the adoption of the collective bargaining agreement, minority underrepresentation on the faculties was indeed substantial and chronic.[16]

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[15] See also The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 140 (1979): "Requiring a school or other institution to forestall adopting an affirmative action program until an official finding of discrimination has been made permits the effects of violations to continue unabated, and wastes resources of both the court and litigants."

[16] The Board found that "by the school year 1968-69, black students made up 15.2 percent of the total student population, while black faculty members constituted only 3.9 percent of the

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Amici urge that the goal of safeguarding results achieved in remedying substantial and chronic underrepresentation must be held to be an important government objective, sufficient under the Constitution to justify public voluntary affirmative action plans.

Petitioners and the Justice Department argue that the school board was not competent to make a finding of past discrimination sufficient to justify the affirmative retention plan, and that comparison of faculty representation to a student body benchmark was an improper basis for the

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total teaching staff. While the percentage of minority students remained relatively constant (15.9 percent in 1971), the percentage of minority faculty members increased, but only to 5.5 percent in 1970-71 and 8.3-8.8 percent in 1971-72," the year the plan was adopted. Wygant, 746 F.2d at 1156.

board's finding. The student body benchmark is not at issue in this case. Nor should competence be at issue here, because no finding of past discrimination is constitutionally required; but even if it is held to be at issue, the school board was competent and its finding was proper.

1. The Board's Competence to Make Findings of Past Discrimination Is Irrelevant to the Validity of the Affirmative Retention Provision.

In Bakke, Justice Powell stated that the Board of Regents of the University of California was not competent to make the finding of past discrimination that would have justified a racial preference in medical school admissions as a remedial measure. Id., 438 U.S. at 305. By contrast, in this case the competence of the board to make findings of past discrimination is

irrelevant, first, because no such finding is required here, and second, because the board's competence is neither an issue before the Court, nor an issue properly to be considered in the context of a collective bargaining agreement.

As argued above, substantial and chronic underrepresentation, and not a finding of past discrimination, is a sufficient basis on which to uphold the goal of a collectively-bargained affirmative retention program as serving an important governmental objective.[17] Because no

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[17] In both Bakke and Fullilove, an official finding of past discrimination was required because the purported goal of the challenged plan was to remedy that discrimination. In Bakke, Justice Powell held that the goal of fostering a diverse student body was a constitutionally permissible one even without a finding of past discrimination because, under the narrower justification, the goal of the plan was not to remedy past discrimination. No finding of past discrimination is required in this case for precisely the same reason: because it is not the goal of the provision at issue to remedy

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finding of past discrimination in the particular school system is necessary, the competence of the school board to make such a finding is not an issue.[18] Moreover,

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past discrimination, but to safeguard results achieved in remedying substantial and chronic underrepresentation.

[18] The board's competence should not be in issue for a second reason: because the layoff provision was voluntarily ratified by the teachers' union.

In Justice Powell's opinion in Bakke, a finding of past racial discrimination, made by a competent body, was required in order to protect the interests of non-minority students who did not consent to the racially preferential policy such a finding was to justify. Here, by contrast, the racially preferential layoff policy was voluntarily adopted by both the board and the union whose members the policy would directly affect. The board's competence to make findings of past discrimination is irrelevant to this case because such a finding is not a prerequisite to the sort of voluntarily-negotiated collective bargaining agreement that embodies the layoff policy. Cf. Tangren v. Wackenhut Services, 658 F.2d 705, 707 (9th Cir. 1981) ("It is settled that seniority rights are not vested property rights, and that these rules can be altered to the detriment of any employee or group of employees by a good faith agreement

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the school board is patently competent to make a finding either of past discrimination or of substantial and chronic underrepresentation.

2. Even if the Board's Competence Were at Issue, the Board Is Competent to Make the Requisite Findings.

In Bakke, Justice Powell stated that the Board of Regents was not competent to make broad findings of past societal discrimination sufficient to justify its

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between the company and the union.... This is particularly true where the changes are undertaken to provide greater representation of minorities") (emphasis added); United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969). The teachers bargained to alter their seniority rights in the event of budgetary layoffs. They did not bargain to require a finding of past discrimination as a precondition to altering their seniority rights. The teachers ratified the provision modifying their seniority rights, ratified the remedial goal of the provision, and ratified the board's finding of underrepresentation. The board's competence, therefore, should not be in issue.

racially preferential admissions policy. Id., 438 U.S. at 307-310.

By contrast, in this case, the board and the teachers together implemented a provision designed to safeguard gains which had been achieved in remedying minority faculty underrepresentation in the unique context of a school system. The board and the union sought not to remedy broad societal discrimination, as in Bakke, but to safeguard gains against underrepresentation with which they were intimately involved on a daily basis and about whose negative effect on school children they had first-hand knowledge. The board, as the entity charged by state law to oversee the composition of the faculty, was competent to make findings of such minority underrepresentation. Bakke, 438 U.S. at 363-64.

This Court has recognized the "special competence of school districts to adopt race-conscious remedies." Kromnick, supra, 739 F.2d at 906. See, e.g., McDaniel v. Barresi, 402 U.S. 39, 41-492 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). Indeed, as this Court stated in Swann:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

Id., 402 U.S. at 16. No coherent line can be drawn which renders a board competent to conclude that a student body should reflect the approximate racial proportion for the district as a whole, but incompetent to conclude that a faculty should reflect that

same approximate proportion. Each conclusion embodies the same kind of findings and educational policies.

Furthermore, no coherent line can be drawn between a school board's competence to determine race-conscious remedies in "desegregation" cases and in "affirmative action" cases. These labels cannot disguise that the same kind of findings and educational policies are at issue in Wygant as in Swann. This Court has struck down "measures that would have limited a school system's power to choose race-conscious remedies." Kromnick, supra, 739 F.2d at 907. See, e.g., Washington v. Seattle School District No. 1, 458 U.S. 457 (1982); Swann, supra.

Amici therefore submit that the board was competent to make a finding of substantial and chronic underrepresentation, and

to choose a reasonable race-conscious plan to safeguard the gains previously made to remedy that underrepresentation.[19]

3. The Student Body Benchmark Is Not in Issue.

The issue whether the board properly used a minority student ratio in finding "substantial underrepresentation" was not presented to the District Court below, and is therefore not properly in issue here. Wygant, 746 F.2d at 1156 n.1. Furthermore, the layoff provision, which is the only provision of the collective bargaining agreement here being challenged, makes no mention whatever of a student body benchmark. The only provision of the col-

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[19] The board was also competent under applicable precedent to make findings of past discrimination. If the Court determines that such a finding is necessary, this case should be remanded for such findings. Amici submit, however, that such findings are not constitutionally required.

lective bargaining agreement at issue here is Article XII, which provides that "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." This layoff provision does not equate the percentage of minorities that may be laid off with the percentage of minorities in the school district. Thus, even on the merits, the student body benchmark is not in issue here.

B. The Affirmative Retention Provision Is Substantially Related to the Objective of Safeguarding Achievements in Remedying Substantial and Chronic Underrepresentation of Minority Faculty.

Under the standard adhered to by four Justices in Bakke, the constitutional validity of a race-conscious state program that serves an important government objective depends on whether the means chosen to

attain that objective are substantially related to it. Id., 438 U.S. at 359. In this case, the affirmative retention provision is substantially related to the important, constitutionally permissible objective of maintaining achieved levels of minority faculty representation so as not to undermine the accomplishments of an affirmative action program.

The "substantial relation" test of Bakke requires that the affirmative action plan (1) not unduly stigmatize any discrete group or individual; and (2) use racial classifications reasonably in light of its objectives. Id., 438 U.S. at 372-376.

1. The Affirmative Retention Provision Does Not Stigmatize any Discrete Group or Individual.

No constitutionally impermissible stigma attaches where, as here, a racial

classification is used to retain qualified minorities in order to safeguard achievements in remedying minority under-representation. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing the burden' by innocent parties is not impermissible." Fullilove, supra, 448 U.S. at 484 (opinion of Chief Justice Burger).

Amici support the Sixth Circuit's analysis of stigma in the context of remedial racial classifications:

> First, though undue stigma must be cautiously guarded against, a plan designed to remedy the effects of past discrimination is not invalid merely because some individuals not in any way culpable with respect to past discriminatory acts must bear the brunt of the racial preference. Valentine v. Smith, 654 F.2d at 511....
>
> This case is "not a simple mirror image of a case involving claims of discrimination against minorities." Detroit Police Officers Association v.

Young, 608 F.2d at 697. We are dealing with a white majority which has traditionally benefited from the prior systematic discriminatory practices which have given rise to the need for the kind of affirmative action program the Detroit Police Board implemented. The self-esteem of whites as a group is not generally endangered by attempting to remedy past acts militating in their favor, the situation only arises in the first instance because of their social dominance. The purpose of this program is to aid blacks, it is not aimed at excluding whites--the fact that whites have equal access to the lieutenant ranks and that the plan is only temporary clearly support this conclusion. In such instances, the white majority is simply not being subjected to what amounts to a constitutionally invidious stigma.

> Second, we believe that where those hired or promoted by operation of affirmative action are qualified for the position in which they are placed, no constitutionally impermissible stigma attaches. Valentine v. Smith, supra.

Bratton, supra, 704 F.2d at 891 (emphasis added). The affirmative retention provision in Wygant attaches no constitutionally impermissible stigma. There is no claim

before the Court that the minority teachers benefited by the provision were not well-qualified--a consideration found decisive by the Sixth Circuit in Bratton, the Eighth Circuit in Valentine, and the Fifth Circuit in Miami, supra.

Nor does any stigma in fact attach to the non-minority teachers whom this policy affects. The self-esteem and societal treatment of non-minority teachers, a group that has not been historically "saddled with disabilities" or "relegated to...a position of powerlessness" (San Antonio Independent School District v. Rodriquez, supra, 411 U.S. at 28), is not endangered by a policy that attempts to preserve gains made against the lingering effects of racial discrimination that has historically militated in their favor. Bratton, supra, 704 F.2d at 891.

Finally, the voluntary, bilateral nature of the affirmative retention policy is crucial to constitutional analysis of this issue as well. The teachers' collective ratification of the affirmative retention provision, at a time when their union was overwhelmingly white, obviates any claim that the provision unduly stigmatizes white teachers.

2. The Affirmative Retention Provision Uses Racial Classifications Reasonably in Light of Its Objectives.

What convinced the Brennan plurality in Bakke that the affirmative action plan there was reasonable in light of its objectives, was the fact that "there are no practical means by which [the board] could achieve its ends in the foreseeable future without the use of race-conscious measures." Id., 438 U.S. at 376. The same is

true here: there are no practical means, other than a race-conscious provision, by which the board could safeguard the achieved level of minority faculty representation in the face of budgetary constraints necessitating teacher layoffs. The race-conscious remedy here was not only reasonable, but necessary.[20]

While the criteria set out by this Court in Weber to test the validity of voluntary private affirmative action plans were not originally applied in a constitutional context, many of the Federal

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[20] Cf. Morgan v. O'Bryant, 671 F.2d 23 (1st. Cir. 1982), cert. denied, 459 U.S. 827, reh'g. denied, 459 U.S. 1059 (1983) (nearly-identical affirmative retention orders held "necessary to safeguard the progress toward desegregation painstakingly achieved;" without them black representation would have fallen to percentages existing before plan went into effect, and such a result "could not be countenanced." Id., 671 F.2d at 27-28 (citing Green v. County School Board, supra, 391 U.S. at 438-39) (emphasis added).

circuits have treated these criteria as applicable in the constitutional review of public affirmative action plans.[21] Thus, these courts test the reasonableness of a voluntary public affirmative action plan according to standards announced in the Title VII context in Weber. Id., 443 U.S. at 208. The affirmative retention provision here meets each of the Weber criteria.

The affirmative retention provision does not unnecessarily trammel the interests of white teachers. The plan was voluntarily agreed upon by both the school board and the teachers themselves. It does not require the hiring of new black teachers to replace discharged white

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[21] See, e.g., Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 484-85 (6th Cir. 1985); Bratton, supra, 704 F.2d at 892; Young, supra, 608 F.2d at 694. See also Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 976-977 (1st Cir. 1982).

teachers; it does not even require that only white teachers be laid off.

Nor does the plan create an absolute bar to the advancement of white teachers. The advancement of white teachers not laid-off proceeds along its usual lines, as does the advancement of those laid-off white teachers who are in time called back to teach. Such collectively-bargained modification of seniority, particularly in order to increase minority representation, is clearly permissible. Tangren v. Wackenhut Services, supra, 658 F.2d at 707.

The affirmative retention provision is certainly limited in duration and scope. The collective bargaining agreement that contains the affirmative retention policy must be ratified periodically. Moreover, the policy provides for call-back of laid-off teachers once those budgetary con-

straints ease. Finally, the policy is necessary to meet the agreed-upon goal of maintaining achieved levels of black faculty representation. Such a voluntary, limited and necessary plan cannot be said to trammel the interests of white employees.

Amici urge that the tests outlined above implement a standard for Equal Protection review appropriate for affirmative action plans entered into by public employers and employees in collective bargaining agreements. Amici further submit that the affirmative retention plan at issue here meets the appropriate standard for Equal Protection both as to ends and as to means.

III. THE AFFIRMATIVE RETENTION PROGRAM IS CONSISTENT WITH THE EQUAL PROTECTION CLAUSE UNDER THE STANDARD ARTICULATED BY JUSTICE POWELL IN BAKKE.

Even under the stricter scrutiny standard set out by Justice Powell in Bakke,

the affirmative retention plan here is sound. In his opinion in Bakke, Justice Powell concluded that an affirmative action plan does not violate the Equal Protection Clause if (1) it serves a sufficiently substantial state purpose or interest, and (2) it is not only reasonable but "necessary... to the accomplishment of its purpose or the safeguarding of its interest." Id., 438 U.S. at 305.[22] In this case, only an affirmative retention provision is in issue, and that provision is necessary to safeguard the substantial interest of the board and the union in maintaining current levels of minority faculty representation

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[22] Justice Powell's requirement that where a finding of past discrimination is necessary, a body competent to make such a finding must do so, is discussed supra in Section II.A.1. and 2. The Jackson Board of Education is competent to make such a finding, and, if this Court determines that one is necessary, the case should be remanded.

in times of budgetary constraints. See infra.

Furthermore, in Bakke, Justice Powell indicated that an admissions program which took race into account without reserving a specified number of seats would be constitutional, because such a program "treats each applicant as an individual." Id., 98 S.Ct. at 2759-60. Here the teachers are individually treated. The teachers themselves bargained for the kind of individual consideration they would receive. Criteria taken into account in determining layoffs included (1) the particular school affected; (2) the seniority of individual teachers; (3) the particular type of position to be eliminated (e.g., physics teacher); (4) whether there is another more junior teacher with the same specialty working at another school who may be "bumped"; and (5) race.

The affirmative retention program the teachers adopted simply aims to safeguard the gains previously achieved by an affirmative action program the hiring goals of which are not under attack. It does so in a sophisticated way, sensitive to the particularized specialties, location and seniority of individual teachers, and to the needs of the student body at particular schools. The program thus does not have the features found objectionable by Justice Powell in Bakke.[23]

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[23] In Bakke, Justice Powell, as well as Justices Brennan, White, Marshall and Blackmun, approved the so-called "Harvard approach," with individualized treatment of applicants and no quantified minority set-aside. "This put a majority of the Court on record that a program which considers race and even the numerical balance of the class, id. at 2765-66 (Powell, J.) (appendix), but which does not set aside a specified number of seats for minorities, is lawful under...the 14th Amendment." The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 136 (1978).

Moreover, there is in this case no Bakke-like simple set-aside of positions for minorities. There is no claim here that candidates are hired in a non-individualized way, again distinguishing this program from the program Justice Powell found unconstitutional in Bakke.

The affirmative retention program here should therefore be held to be constitutional.

A. The Affirmative Retention Program Serves a Sufficiently Substantial State Purpose or Interest.

In Bakke, Justice Powell held that the Board of Regents' interest in attaining a diverse student body was sufficiently substantial to justify a race-conscious remedy, but that the means chosen to achieve that end were impermissible because they were not necessary to its achievement. Id., 438 U.S. at 316. Justice

Powell also concluded that the Board's interest in remedying societal discrimination may have been substantial, but that the Board was not competent to make findings that such societal discrimination existed. Id. at 306.

In this case, the interest of the union and the board in maintaining a racially diverse faculty is substantial even under Justice Powell's standard in Bakke. The board and the teachers agreed, and the Sixth Circuit affirmed, that minority faculty underrepresentation prior to institution of the policy was substantial and chronic. The affirmative retention policy, in addition to serving that substantial interest, also serves the related interests of the union and the board in "promoting racial harmony in the community and providing role models for minority stu-

dents." Wygant, 746 F.2d at 1157. Together, these interests are sufficiently substantial to justify the adoption by the board and the union of the voluntary affirmative retention plan here at issue.

In Morgan v. O'Bryant, supra, the First Circuit upheld a court-ordered affirmative retention program remarkably similar to that under review here. The court had previously ordered that black and white teachers be hired on a one-for-one basis until the percentage of black faculty reached 20%, the approximate percentage of blacks in Boston at that time. Id., 671 F.2d at 24. Faced with a budget crisis, however, and the fact that the existing collective bargaining agreement contained a reverse seniority layoff provision which "would drastically reduce the percentage of black teachers," id., the Boston School

Committee decided that "if layoffs of teachers prove to be necessary, they should be conducted so as to maintain the current percentage of black teachers." Id. at 25. The School Committee filed a motion to approve this decision, the District Court granted the motion, and the First Circuit affirmed the District Court's orders. The Court stated:

> The [school children] have a right to an education in a school system free of racial discrimination in the employment of teachers and staff. ... The elimination of the vestiges of a segregated school system can not be accomplished until the effects of past hiring discrimination have been eradicated. An integrated faculty and staff is also necessary to bring black students and parents fully into the school community and decision-making processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models, which may be "important because they can encourage minority students to higher aspirations and at the same time work

> to dispel myths and stereotypes about their race. ..." We thus conclude that the orders here are remedial: they are designed to make the children whole, to vindicate their rights, and that is indeed their effect.

Id., 671 F.2d at 27-28 (emphasis added). Morgan v. O'Bryant was a desegregation case, and Wygant is an affirmative action case. However, the layoff provision and the goals in each case are nearly identical. The desegregation goals mandated by this Court can only be voluntarily fulfilled by school boards making such findings, and instituting such voluntary plans, as in Wygant. Otherwise, desegregation will be committed to years of arduous litigation. The goals in Wygant were nearly identical to those in Morgan v. O'Bryant, and were sufficiently substantial to meet the strictest standard of review in both cases.

B. The Affirmative Retention Plan is Necessary to Safeguard the Board's Interest in Maintaining Achieved Levels of Black Faculty Representation.

Under Justice Powell's standard in Bakke, the constitutional validity of a race-conscious state program that serves a substantial state interest or purpose, depends on whether the means chosen are necessary to safeguard that interest or to accomplish that purpose. Id., 438 U.S. at 305.[24] In this case, the affirmative retention policy is necessary to safeguard the substantial, constitutionally permissible interest in preserving affirmatively-achieved levels of minority faculty representation in the face of budgetary constraints necessitating teacher layoffs. Tangren v. Wackenhut Services, supra, 658 F.2d at 707 (similar affirmative retention provision held "carefully contoured to accomplish its limited objective--insuring that any reductions in force do not disproportionately impact on minorities.")[25]

Thus, the affirmative retention policy was necessary to safeguard a sufficiently substantial government interest, and Article XII is constitutional even under Justice Powell's stricter scrutiny standard.

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[24] As Justice Powell stated in Fullilove, "this Court has not required remedial plans to be limited to the least restrictive means of implementation." Id., 448 U.S. at 508 (emphasis added). The other opinions in Fullilove adopted a "substantial relation" test, id. at 520 (Marshall, J.) or a "narrowly tailored" test, id. at 490 (Burger, C.J.).

[25] Cf. Morgan v. O'Bryant, supra, 671 F.2d at 27-28 (nearly-identical affirmative retention orders held "necessary to safeguard the progress toward desegregation painstakingly achieved;" without them black representation would have fallen to percentages existing before plan went into effect, and such a result "could not be countenanced." Id., 671 F.2d at 27-28 (citing Green v. County School Board, supra, 391 U.S. at 438-39) (emphasis added).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

Barbara R. Arnwine
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION

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APPENDIX A

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

MICHAEL S. DUKAKIS
GOVERNOR

August 21, 1985

Rev. Charles Stith
Leonard Zakim, Esq.
Martin A. Walsh
Co-Chairman
Greater Boston Civil Rights Coalition

Dear Sirs:

It is with pleasure that I write to commend the work of The Greater Boston Civil Rights Coalition (GBCRC), a vital and important force, working for the racial, religious and ethnic equality in the Commonwealth of Massachusetts.

My administration has worked closely with the GBCRC for a number of years to insure maximum equal opportunity for all citizens in the Commonwealth.

The work of the GBCRC exemplifies the benefits that can be obtained from a combination of governmental and private citizen initiated programs.

In the area of affirmative action in employment, the Commonwealth has benefited from the suggestions and assistance of the GBCRC. As a result of our interactions on February 25, 1983 I signed Executive Order 227, setting forth voluntary affirmative action objectives for all job categories in the Commonwealth. The Preamble of Executive Order 227 states

> "The Commonwealth of Massachusetts has led this nation, since its birth, in protecting the rights and privileges of individuals. The Massachusetts Constitution of 1780, which has been a model for other states, is based on a belief in freedom and equality for all mankind, and in the duty of government to safeguard and foster for its people, the enjoyment of these rights.

Our strong commitment to this principle is demonstrated by our strong laws prohibiting discrimination because of race, color, religion, creed, ancestry, national origin, military status, sex, age, and handicap in the areas of employment, education, private and public housing units, commercial property and public accommodations.

But, in spite of these accomplishments, much remains to be done. Many families presently suffer from inadequate income, sub-standard and overcrowded housing, and inferior education and de facto segregation bar them from the better jobs, dwellings and schools. We recognize that any such effects of any illegal past or present discriminatory practices by state appointing authorities must be affirmatively remedied, and that the ratio of racial and sexual makeup of the state work force should at all levels, reflect the ratio of racial and sexual makeup of the population where the jobs exist."

To further our goal of more minority representation, the Commonwealth adopted a minority executive search program to encourage minorities and women to enter governmental employment.

Recently, the GBCRC and I jointly convened a summit of chief executive officers in the private sector to urge that they follow the Commonwealth's example of voluntary affirmative action in employment.

I am proud of the joint achievements and strides made by the Commonwealth and the Greater Boston Civil Rights Coalition working together for the fulfillment of this nation's ideal and commitment to equal opportunity for all.

Sincerely,

Michael S. Dukakis

MSD/msa

APPENDIX B

CITY OF BOSTON · MASSACHUSETTS

OFFICE OF THE MAYOR
RAYMOND L. FLYNN

August 22, 1985

Rev. Charles Stith
Leonard Zakim, Esq.
Martin A. Walsh
Co-Chairmen
Greater Boston Civil Rights Coalition

Dear Sirs:

It is with enthusiasm that I commend the Greater Boston Civil Rights Coalition in supporting the efforts of the City of Boston in striving for equal employment opportunity for all Bostonians.

Your vision, suggested programs and level headed and persuasive approach to the topic of affirmative action has been most beneficial. Since the inception of my administration, the Greater Boston Civil Rights Coalition has been an effective advocate for prioritizing issues concerning equal employment opportunity, especially affirmative action programs.

I have recently created the position of Director of Affirmative Action within the City of Boston. This office has worked closely with the Greater Boston Civil Rights Coalition. We are in the process of adopting an affirmative action plan setting forth hiring goals for racial minorities and women in all job categories. Also, in consideration of proposals made by the Greater Boston Civil Rights Coalition, I appointed a Senior Advisor on Equal Rights to oversee the Civil Rights Department.

It is the commitment of my administration to continue working with the Greater Boston Civil Rights Coalition in promoting programs to urge affirmative action by private employers in Boston.

I am proud of our accomplishments to date and look forward to continued work in the upcoming years in fulfilling our mutual objectives of racial harmony and equal opportunity in the City of Boston.

Sincerely,

Raymond L. Flynn

Raymond L. Flynn
Mayor, The City of Boston